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Twelfth report on reservations to treaties*

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* For technical reasons, this document is entitled "Twelfth report" and is being issued as a separate document; in fact it constitutes the second part of the eleventh report (A/CN.4/574), from which it carries on, including in the numbering of the paragraphs and footnotes.

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B. Procedure for acceptances of reservations

181. According to the provisional general outline of this study,[302] the second section of part III (on the formulation and withdrawal of reservations, acceptances and objections) should deal with the formulation of acceptances of reservations and be structured as follows:

B. Formulation of acceptances of reservations

(a) Procedure regarding formulation of an acceptance (1969 and 1986, article 23, paragraphs 1 and 3);

(b) Implicit acceptance (1969 and 1986, article 20, paragraphs 1 and 5);

(c) Obligations and express acceptance (1969 and 1986, article 20, paragraphs 1, 2[303] and 3).[304]

182. Subject to transposing sections B (Formulation of acceptances of reservations) and C (Formulation of objections to reservations), the explanation for which was already given in the eighth report by the Special Rapporteur,[305] the following should be noted with respect to this framework:

(a) First, unlike the case of reservations and objections and following the example of articles 22 and 23, paragraph 4, of the Vienna Conventions,[306] it does not mention the withdrawal of acceptances, which appear to be considered as irreversible;[307]

(b) Secondly, it should be noted that only questions relating to the form and procedure for the formulation of acceptances of reservations will be addressed; in accordance with the provisional outline,[308] difficulties relating to their effects will be covered in subsequent chapters. The focus at this stage should be on how and under what procedural conditions a State or international organization may expressly accept a reservation by leaving open the question of whether and under which circumstances such an express acceptance is necessary for the sake of "establishing" the reservation (within the meaning of the chapeau of article 21, paragraph 1, of the Vienna Conventions).

183. As in the case of objections, each of the questions dealt with in this section will be presented in the following manner:

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[302] A/CN.4/477, para. 37. See also A/CN.4/526, para. 18.

[303] The reference to paragraph 2 of article 20 is obviously erroneous: In no way does this provision either specify or imply that the acceptance of a reservation to a limited treaty must be express. See paras. 221-224 below.

[304] The parenthetical references relate to the relevant provisions of the Vienna Convention on the Law of Treaties of 1969 and Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986.

[305] A/CN.4/535 and Add.1, para. 69.

[306] "The withdrawal of a reservation or of an objection to a reservation must be formulated in writing."

[307] See paras. 271-275 below.

[308] See A/CN.4/477, para. 37, sections B and C of Part IV (Effects of reservations, acceptances and objections).

(a) To the extent that they are covered by express provisions of the 1969 and 1986 Vienna Conventions, these provisions will be discussed in the light of the *travaux préparatoires*;

(b) Such provisions, which should be reproduced in the Guide to Practice, will then be supplemented on the basis of an in-depth study, as far as possible, of practice, jurisprudence and legal doctrine;

(c) This should result in draft guidelines which are sufficiently clear to enable users of the Guide to find answers to any questions they may have in practice.

184. Under the provisions of the Vienna Conventions of 1969 and 1986, save in exceptional cases, the acceptance of a reservation, which is not always necessary for a reservation to be established,[309] may be either express, tacit or implicit (sect. 1 below). It is assumed that the tacit (or implicit) acceptance results from silence on the part of contracting States or international organizations during a specific period or at a time when they should have objected; thus, no procedural difficulty is likely to arise, contrary to what occurs when the acceptance is express (sect. 2), including in the particular case of reservations to constituent instruments of international organizations (sect. 3). In every case, whether express or tacit, the acceptance of a reservation is irreversible (sect. 4).

1. Express or tacit acceptance of reservations

185. In accordance with paragraph 5 of article 20[310] of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986:

> For the purposes of paragraphs 2 and 4,[311] and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of 12 months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

186. Acceptance of a reservation is therefore defined as the absence of an objection and occurs in principle when an objection is not raised under either of the two conditions specified by this provision: by the date of receipt of the notification of the reservation or the date of the expression of consent to be bound. In these two cases, which are conceptually distinct but yield identical results in practice, silence is tantamount to acceptance without the need for a formal unilateral statement. This

[309] See para. 188 below.

[310] This article is entitled "Acceptance of and objection to reservations". Unlike the English text, the French version of the two Vienna Conventions keeps the word "acceptance" in the singular but leaves "objections" in the plural. This distortion, which appeared in 1962 (see *Annuaire de la Commission du droit international, 1962*, vol. I, 663rd meeting, 18 June 1962, p. 248 and *Yearbook of the International Law Commission, 1962*, vol. I, 663rd meeting, 18 June 1962, p. 223 (text adopted by the Drafting Committee); *Annuaire ... 1962*, vol. II, p. 196 and *Yearbook ... 1962*, vol. II, p. 176) was never corrected or explained.

[311] Paragraph 2 refers to reservations to treaties with limited participation; paragraph 4 establishes the effects of the acceptance of reservations and objections in all cases other than those of reservations expressly authorized by the treaty, treaties with limited participation and the constituent acts of international organizations.

does not mean, however, that acceptance is necessarily tacit: nothing prevents a State or an international organization from expressly formulating it, and such acceptance may be binding, which is implied by the phrase "unless the treaty otherwise provides" — even if it was inserted in this provision for other reasons[312] — and the omission, in paragraph 5, of any reference to paragraph 3 of article 20, which does indeed require a particular[313] form of acceptance.

187. It has been argued nevertheless that this division between formal acceptances and tacit acceptances of reservations disregards the necessary distinction between two forms of acceptance without a unilateral statement, which could be either tacit or implicit. Furthermore, according to some authors, reference should be made to "early" acceptance when the reservation is authorized by the treaty: "Reservations may be accepted, according to the Vienna Convention, in three ways: in advance, by the terms of the treaty itself or in accordance with Article 20 (1)."[314] None of these arguments, in the view of the Special Rapporteur, should be reflected in the Guide to Practice.

188. With respect to so-called "early" acceptances, the Commission's commentary on draft article 17 (current article 20) clearly indicates that:

> Paragraph 1 of this article covers cases where a reservation is expressly or impliedly authorized by the treaty; in other words, where the consent of the other contracting States has been given in the treaty. No further acceptance of the reservation by them is therefore required.[315]

In fact, the silence of the other parties does not constitute a tacit acceptance: in the absence of a conflicting provision of the treaty, an acceptance is simply not a condition for a reservation to be established; it is established ipso facto by virtue of the treaty. Although this does not prohibit States from expressly accepting a reservation of this kind, such an express acceptance is a redundant act, with no specific effect, and of which, in any case, there is no example known to the Special Rapporteur. Therefore, it would not be useful to explore this possibility within the framework of the Guide to Practice.[316]

189. The same applies to the distinction made by some authors based on the two cases provided for in article 20, paragraph 5, of the Vienna Conventions between "tacit" and "implicit" acceptances, depending on whether or not the reservation has already been made at the time when the other interested party expresses its consent to be bound. In the former case, the acceptance would be implicit; in the latter, it would be tacit.[317] In the former case, States or international organizations are

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[312] See below, para. 211.

[313] See below, paras. 240-270.

[314] D. W. Greig, "Reservations: Equity as a Balancing Factor?", *Australian Yearbook of International Law*, 1995, p. 118. This article is perhaps the most thorough study of the rules which apply to the acceptance of reservations (see especially pp. 118-135 and 153).

[315] *Yearbook of the International Law Commission, 1966*, vol. II, p. 207, para. 18.

[316] The rule set out in article 20, paragraph 1, must be borne in mind; it would be more logical to do so, however, in the part of the Guide concerning the effects of acceptances of reservations.

[317] D. W. Greig, note 314 above, p. 120; Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (T.M.C. Asser Institute, The Hague, 1988), pp. 125-126; Daniel Müller, Commentary on article 20 (1969) in Olivier Corten and Pierre Klein (eds.), *Les Conventions de Vienne sur le droit des traités: Commentaire article par article* (Brussels, Bruylant, 2006), p. 816, para. 35.

deemed to have accepted the reservation if they have raised no objection thereto when they express their consent to be bound by the treaty. In the latter case, the State or international organization has a period of 12 months to raise an objection, after which it is deemed to have accepted the reservation.

190. Although the result is the same in both cases — the State or international organization is deemed to have accepted the reservation if no objection has been raised at a specific time — their grounds are different. With respect to States or international organizations which become contracting parties to a treaty after the formulation of a reservation, the presumption of acceptance is justified not by their silence but rather the fact that this State or international organization, aware of the reservations formulated,[318] accedes to the treaty without objecting to the reservations. The acceptance is thus implied in the act of ratification of or accession to the treaty, that is, in a positive act which fails to raise objections to reservations already formulated.[319] With respect to States or international organizations which are already parties to a treaty when the reservation is formulated, however, the situation is different: It is their protracted silence — generally for a period of 12 months — or, in particular, the absence of any objection on their part which is considered as an acceptance of the reservation. This acceptance is therefore inferred only from the silence of the State or international organization concerned; it is tacit.

191. In fact, this doctrinal distinction is of little interest in practice and should probably not be reflected in the Guide to Practice. It is sufficient, for practical purposes, to distinguish the States and international organizations which have a period of 12 months to raise an objection from those which, not yet being parties to the treaty at the time of the formulation of the reservation, have time for consideration until the date of expression of their consent to be bound by the treaty, which nevertheless does not prevent them from raising an objection before this date.[320] This is an issue of a time period, however, not of a definition.

192. Another question relates to the definition itself of tacit acceptances. It may well be asked whether in some cases an objection to a reservation is not tantamount to a tacit acceptance thereof.

193. This paradoxical question stems from the wording of paragraph 4 (b) of article 20. The paragraph states:

> An objection by a contracting State or by a contracting organization to a reservation does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or organization unless a contrary intention is definitely expressed by the objecting State or organization.

It thus seems to follow that in the event that the author of the objection raises no objection to the entry into force of the treaty between itself and the reserving State, an objection has the same effects as an acceptance of the reservation, at least concerning the entry into force of the treaty (and probably the "establishment" of the reservation itself).

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[318] See below, para. 219.

[319] See D. Müller, footnote 317 above, p. 816, para. 36. See also draft article 10, paragraph 5, of Brierly, [First] Report on the law of treaties, A/CN.4/23, para. 100; for the English version see *Yearbook ... 1950*, vol. II, p. 241, para. 100.

[320] See above, paras. 76-84.

194. This question, which involves much more than purely hypothetical issues, nevertheless primarily concerns the problem of the respective effects of acceptances and objections to reservations. It relates more to the part of the Guide to Practice which deals with these effects. At the present stage, it is probably sufficient to make reference to it in the commentary on draft guideline 2.8.1.[321]

195. In the light of these observations, for the purpose of defining and categorizing acceptances, it is probably sufficient to indicate in the heading of the section of the Guide to Practice on the formulation of objections:

> **2.8 Formulation of acceptances of reservations**
>
> The acceptance of a reservation arises from the absence of objections to the reservation formulated by a State or international organization on the part of the contracting State or contracting international organization.
>
> The absence of objections to the reservation may arise from a unilateral statement in this respect [(express acceptance)] or silence kept by a contracting State or contracting international organization within the periods specified in guideline 2.6.13 [(tacit acceptance)].

Even if the bracketed comments may only be used in the commentaries on draft guideline 2.8, their inclusion in parentheses in the text itself would probably have the advantage of emphasizing the guideline's "definitional" role.

196. Draft guideline 2.8 limits the potential authors of an acceptance to contracting States and organizations alone. This is easily explained: article 20, paragraph 4, takes into consideration only acceptances made by a contracting State or contracting international organization, and article 20, paragraph 5, applies the presumption of acceptance only for States which are parties to the treaty. Thus, a State or an international organization which on the date when notice of the reservation is given is not yet a contracting party to the treaty will be considered as having accepted the reservation only on the date when it expresses its consent to be bound, that is, the date when it definitively becomes a contracting State or contracting organization. It is a different matter, however, for the limited treaties referred to in paragraph 2 of article 20 of the Vienna Conventions[322] and constituent instruments of international organizations provided for in paragraph 3 of that article.[323]

197. Furthermore, in keeping with the purpose of section 2 of the Guide to Practice in which it is meant to appear, the definition of acceptances to reservations given in draft guideline 2.8 is purely descriptive and is not intended to establish cases in which it is possible or necessary to resort to either of the two possible forms of acceptances. It arises from both the text of the Vienna Conventions and their *travaux préparatoires* and the practice that tacit acceptance is the rule and express acceptance the exception.

198. In the Advisory Opinion of the International Court of Justice on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, the Court had emphasized that the "very great allowance made to tacit assent to

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[321] See below, paras. 205 and 206.

[322] See below, paras. 221-224.

[323] See below, paras. 240-270.

reservations"[324] characterized international practice which was becoming more flexible with respect to reservations to multilateral conventions. Although, traditionally, express acceptance alone had been considered as expressing consent by other contracting States to the reservation,[325] this solution, already outdated in 1951, no longer seemed practicable owing to, as the Court stated, "the very wide degree of participation" in some of these conventions.[326]

199. Despite the different opinions expressed by the members of the Commission during the discussion of article 10 of the draft of J. L. Brierly in 1950,[327] which asserted, to a limited degree,[328] the possibility of consent to reservations by tacit agreement,[329] H. Lauterpacht and G. G. Fitzmaurice have also allowed for the principle of tacit acceptance in their drafts.[330] This should come as no surprise. In the traditional system of unanimity widely defended by the Commission's first three Special Rapporteurs on the law of treaties, the principle of tacit acceptance is bound to be included to avoid excessive periods of legal uncertainty: Owing to the lack of presumption in this respect, the protracted silence of a State party to a treaty could hinder the outcome of the reservation and challenge the status of the reserving State in relation to the treaty for an indefinite period.

200. In that light, although the principle of tacit consent does not meet the same requirements in the "flexible" system ultimately upheld by the fourth Special Rapporteur of the Commission on the law of treaties, it maintains some merits and advantages. In his first report, Sir Humphrey upheld the principle in the draft articles which he had submitted to the Commission.[331] He put forward the following explanation for doing so:

> It is ... true that, under the "flexible" system now proposed, the acceptance or rejection by a particular State of a reservation made by another primarily concerns their relations with each other, so that there may not be the same urgency to determine the status of a reservation as under the system of unanimous consent. Nevertheless, it seems very undesirable that a State, by refraining from making any comment upon a reservation, should be enabled

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[324] *I.C.J. Reports 1951*, p. 21.

[325] Pierre-Henri Imbert, *Les réserves aux traités multilatéraux* (Paris, Pedone, 1979), p. 104. The author refers to the work of D. Kappeler, *Les reserves dans les traités internationaux* (Verlag für Recht und Gesellschaft, Berlin, 1958), pp. 40-41.

[326] *I.C.J. Reports 1951*, p. 21.

[327] *Yearbook of the International Law Commission, 1950*, vol. 1, fifty-third session, 23 June 1950, pp. 92-95, paras. 41 to 84. Mr. el-Khoury even went so far as to say that the mere silence of a State should not be regarded as implying an acceptance, but rather as a refusal to accept the reservation (ibid., p. 94, para. 67); this view remained, however, an isolated view.

[328] Brierly's draft article 10 in fact envisaged only cases of implicit acceptance, that is, cases where a State accepted all existing reservations to a treaty of which it was aware when it acceded thereto. For the text of draft article 10, see Report on the law of treaties (A/CN.4/23), p. 48 [*Yearbook ... 1950*, vol. II, pp. 238-242].

[329] In fact, this was rather a matter of implicit acceptance; see para. 189 above.

[330] See the summary of the position of the Special Rapporteurs and of the Commission in Humphrey Waldock, First Report on the Law of Treaties (A/CN.4/144), *Yearbook ... 1962*, vol. II, pp. 66-67, para. 14.

[331] See draft article 18, paragraph 3, of his first report (ibid., pp. 69-70 and pp. 76-77, paras. 14-17); reprinted in draft article 19, para. 4, in his fourth report (A/CN.4/177, cited above in footnote 166, p. 53).

more or less indefinitely to maintain an equivocal attitude as to the relations between itself and the reserving State ...[332]

201. The provision which would become the future article 20, paragraph 5, was ultimately adopted by the Commission without any discussion.[333] During the Vienna Conference of 1968-1969, article 20, paragraph 5, also raised no problem and was adopted with the inclusion of the almost useless[334] clarification "unless the treaty otherwise provides" as the only amendment.[335]

202. The work of the Commission concerning the law of treaties between States and international organizations or between international organizations has not greatly changed or challenged the principle of tacit consent. Nevertheless, the Commission had decided to assimilate international organizations with States concerning the issue of tacit acceptance.[336] Following criticism made by some States,[337] the Commission decided to "refrain[] from saying anything in article 20, paragraph 4, concerning the problems raised by the protracted absence of any objection by an international organization", but "without thereby rejecting the principle that even where treaties are concerned, obligations can arise for an organization from its conduct".[338] Draft article 20, paragraph 4, adopted by the Commission thus echoes article 20, paragraph 5, of the Vienna Convention of 1969 word for word.[339] During the Vienna Conference, assimilation between States and international organizations was nevertheless reintroduced on the basis of several amendments in this respect[340] and thorough discussions.[341]

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[332] First report (A/CN.4/144), footnote 330 above, p. 67, para. 15.

[333] *Yearbook ... 1965*, vol. I, 816th meeting, 2 July 1965, pp. 283-284, paras. 43-53; see also P.-H. Imbert, footnote 325 above, p. 105.

[334] On the meaning of this part of the provision, see below, paras. 210-211.

[335] United States amendment (A/CONF.39/C.1/L.127), *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, Documents of the Conference* (A/CONF.39/11/Add.2), p. 136. Two other amendments which would have deleted the reference to paragraph 4 (Australia) (A/CONF.39/C.1/L.166, ibid., p. 136) and replaced article 17 with new wording limiting the period for the presumption to six months (Union of Soviet Socialist Republics) (A/CONF.39/C.1/L.115, ibid., p. 133) were either not adopted or withdrawn.

[336] See draft articles 20 and 20 bis adopted on first reading, *Yearbook of the International Law Commission, 1977*, vol. II, Part II, pp. 111-113.

[337] See *Yearbook of the International Law Commission, 1981*, vol. II, Part II, annex II, sect. A.2 (Byelorussian Soviet Socialist Republic), sect. A.12 (Ukrainian Soviet Socialist Republic), sect. A.13 (Union of Soviet Socialist Republics) and sect. C.1 (Council for Mutual Economic Assistance); see also the summary by the Special Rapporteur in his tenth report, *Yearbook of the International Law Commission, 1981*, vol. II, Part I (A/CN.4/341), p. 61, para. 75.

[338] See the commentary on draft article 20, *Yearbook of the International Law Commission, 1982*, vol. II, Part II, pp. 135-36, paras. 5 and 6.

[339] *Yearbook of the International Law Commission, 1982*, vol. II, Part II, p. 36.

[340] China (A/CONF.129/C.1/L.18, proposing a period of 18 months applicable to States and international organizations), Austria (A/CONF.129/C.1/L.33) and Cape Verde (A/CONF.129/C.1/L.35), *United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Official Records, Vienna, 18 February-21 March 1986, vol. II, Documents of the Conference* (A/CONF.129/16/Add.1), pp. 70-71, para. 70.

[341] See *United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Official Records, Vienna, 18 February-21 March 1986, vol. I, Summary records of the plenary meetings of the Committee of the Whole* (A/CONF.129/16), 12th to 14th meetings, 27 and 28 February, 1986, pp. 104-114.

203. In line with the procedure followed in adopting draft guideline 1.1 (which reproduces the wording of article 2, paragraph 1 (d), of the 1986 Vienna Convention), it seems that the Commission's Guide to Practice should include a draft guideline reflecting article 20, paragraph 5, of the 1986 Convention. This provision cannot be reproduced word for word, however, as it refers to other paragraphs in the same article which do not belong in the part of the Guide to Practice having to do with the formulation of reservations, acceptances and objections.

204. This problem could easily be resolved by removing the reference to paragraphs 2 and 4 in paragraph 5. These provisions discuss cases in which unanimous acceptance is, and is not, required in order for the reservation to be established and this is a question of validity, not of procedure; these provisions are not, therefore, directly relevant to the question of the formulation (in the procedural sense of the word) of reservations, acceptances and objections, the only question that is relevant in the context of part III of the Guide to Practice. However, in order to remain true to the spirit of article 20 of the Vienna Conventions, it might be useful to specify that cases in which an express acceptance is required are excluded.

205. This clarification appears in square brackets in draft guideline 2.8.1 bis, which might be worded as follows:

2.8.1 bis Tacit acceptance of reservations

Unless the treaty otherwise provides [or, for some other reason, an express acceptance is required], a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of 12 months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

206. However, if the Commission decides to retain draft guideline 2.6.13 (Time period for formulating an objection),[342] the above wording, if adopted, would have the disadvantage of repeating draft guideline 2.6.13 almost word for word. Therefore, in order to avoid redundancies, draft guideline 2.8.1 could simply refer to draft guideline 2.6.13, as follows:

2.8.1 Tacit acceptance of reservations

[Unless the treaty otherwise provides, a] [A] reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation in accordance with guidelines 2.6.1 to 2.6.14.

207. In the opinion of the Special Rapporteur, this wording cannot be accused of departing from article 20, paragraph 5, of the Vienna Conventions, since it refers to draft guideline 2.6.13, which itself reproduces (from the angle of objections) article 20, paragraph 5. This wording also has a number of advantages. First, it prevents the Guide to Practice from including two provisions which, in reality, relate to the same issue (or two sides of the same coin) and are more or less identically worded. Furthermore, it emphasizes more clearly the dialectic between (tacit) acceptance and objection — objection excludes acceptance and vice versa.[343]

[342] See para. 128 above.

[343] See D. Müller, footnote 317 above, pp. 822-823, para. 49.

During the Vienna Conference of 1968, the French representative expressed this idea in the following terms:

> [A]cceptance and objection are the obverse and reverse sides of the same idea. A State which accepts a reservation thereby surrenders the right to object to it; a State which raises an objection thereby expresses its refusal to accept a reservation.[344]

208. Admittedly, this idea is included in the wording of article 20, paragraph 5, of the Vienna Conventions which is reproduced in draft guideline 2.8.1 bis; however, by removing superfluous elements (most of them temporal in nature), this idea is brought out more clearly.

209. One could, however, question whether it is necessary to include in draft guideline 2.8.1 the phrase in square brackets ("Unless the treaty otherwise provides").

210. This does not really need to be spelled out, since all the provisions of the Vienna Conventions are of a residuary, voluntary nature and apply only if the treaty does not otherwise provide. The same must therefore be true, a fortiori, of the guidelines contained in the Guide to Practice.[345]

211. That said, the *travaux préparatoires* for article 20, paragraph 5, of the 1969 Vienna Convention shed light on why this phrase was inserted. Indeed, this phrase ("unless the treaty otherwise provides") was included in response to an amendment proposed by the United States.[346] The United States representative to the Conference explained that an amendment had been proposed because

> [t]he Commission's text seemed to prevent the negotiating States from providing in the treaty itself for a period shorter or longer than twelve months.[347]

The United States amendment was, therefore, aimed not at the principle of tacit assent as such, but rather at the period of 12 months established by the Commission.[348]

212. It therefore seems entirely justified to retain the phrase "unless the treaty otherwise provides" in draft guideline 2.6.13 (Time period for formulating an objection),[349] if only because it should depart as little as possible from the text of the Vienna Convention, which it reproduces almost word for word. Furthermore, it is draft guideline 2.6.13 that discusses the time period within which, and the moment at which, an objection can validly be formulated and the United States

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[344] *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11), 22nd meeting, 11 April 1968, p. 116, para. 14.

[345] For similar comments on the same issue, see, for example, A/CN.4/526/Add.2, para. 86, on draft guideline 2.5.1 ("Withdrawal of reservations"), which reproduces the provisions of article 22, paragraph 1, of the 1986 Vienna Convention.

[346] See footnote 335 above.

[347] *Summary records* (A/CONF.39/11), footnote 344 above, 21st meeting, 10 April 1968, p. 108, para. 13.

[348] José María Ruda argues, however, that the United States amendment emphasizes the "residual character of Article 20, paragraph 5" ("Reservations to Treaties", *Recueil des cours de l'Académie de droit international de la Haye (RCADI)*, vol. 146, 1975-III, p. 185).

[349] See para. 128 above.

introduced its amendment to article 20, paragraph 5, during the 1968-1969 Conference precisely in order to draw attention to the possibility of altering the 12-month period indicated therein.[350] It would not therefore seem useful to repeat this phrase in draft guideline 2.8.1, the purpose of which is to emphasize that the presumption of tacit acceptance in the absence of an objection is the general rule, as the reference to guideline 2.6.13 is a sufficient reminder that this presumption is not absolute. In any case, the provisions of the Vienna Convention and, in particular, the provisions relating to reservations may be modified and altered by States or international organizations that are parties to the treaty.

213. The 12-month period enshrined in article 20, paragraph 5, was the result of an initiative by Sir Humphrey Waldock and was not chosen arbitrarily. By proposing such a time period, he did, however, depart from — the fairly inhomogeneous — State practice at that time. The Special Rapporteur had found time periods of 90 days and of six months in treaty practice,[351] but preferred to follow the proposal of the Inter-American Council of Jurists.[352] In that regard, he noted the following:

> But there are, it is thought, good reasons for proposing the adoption of the longer period. First, it is one thing to agree upon a short period for the purposes of a particular treaty whose contents are known, and a somewhat different thing to agree upon it as a general rule applicable to every treaty which does not lay down a rule on the point. States may, therefore, find it easier to accept a general time limit for voicing objections, if a longer period is proposed.[353]

214. Even though article 20, paragraph 5, of the Vienna Conventions does not seem to be part of customary international law, at least with respect to the 12-month period within which an objection must be formulated in order to reverse the presumption of acceptance,[354] the fact remains that this provision does stipulate a 12-month period and, according to the practice adopted by the Commission during its work on reservations, there should be good reason for departing from the wording of the provisions of the Conventions. While the 12-month period did not emerge as a well established customary rule during the Vienna Conference and is still not one, perhaps, to this day, it is still "the most acceptable" period.[355] F. Horn noted the following in that regard:

> A too long period could not be admitted, because this would result in a protracted period of uncertainty as to the legal relations between the reserving state and the confronted parties. Nor should the period be too short. That again

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[350] See para. 211 and footnote 347 above.

[351] First report on the law of treaties (A/CN.4/144), *Yearbook ... 1962*, vol. II, pp. 66-67, para. 14.

[352] Ibid., p. 67, para. 16.

[353] Ibid.

[354] See D. Müller, footnote 317 above, p. 808, para. 16. See also Gorgio Gaja, "Unruly Treaty Reservations", in *Le Droit international à l'heure de sa codification: Études en l'honneur de Roberto Ago*, A. Giuffrè, Milan, 1987, p. 324; D. W. Greig, footnote 314 above, pp. 127 et seq.; Anthony Aust, *Modern Treaty Law and Practice*, Cambridge University Press, 2000, p. 127.

[355] P.-H. Imbert, footnote 325 above, p. 107. D. W. Greig considers that the 12-month period established in article 20, paragraph 5, of the Vienna Convention is at least "a guide to what is reasonable" (footnote 314 above, p. 128).

would not leave enough time for the confronted states to undertake the necessary analysis of the possible effects a reservation may have for them.[356]

215. In fact, this time period — which clearly emerged from the progressive development of international law when the Vienna Convention was adopted — has never fully taken hold as a customary rule that is applicable in the absence of text. For a long time, the practice of the Secretary-General as depositary of multilateral treaties was difficult to reconcile with the provisions of article 20, paragraph 5, of the Vienna Conventions.[357] This is because in cases where the treaty was silent on the issue of reservations, the Secretary-General traditionally considered that, if no objection to a duly notified reservation had been received within 90 days, the reserving State became a contracting State.[358] However, having decided that this practice delayed the entry into force of treaties and their registration,[359] the Secretary-General abandoned this practice and now considers any State that has formulated a reservation to be a contracting State as of the date of effect of the instrument of ratification or accession.[360] In order to justify this position, the Secretary-General has pointed out that it is unrealistic to think that the conditions set out in article 20, paragraph 4 (b), can be met, since in order to preclude the entry into force of the treaty for the reserving State, all the contracting Parties would have had to object to the reservation. The Secretary-General's comments are, therefore, less about the presumption established in paragraph 5 than about the unrealistic nature of the three subparagraphs of paragraph 4. The Secretary-General also recently stated that he was in favour of the 12-month period specified in paragraph 5, which now applies to the — necessarily unanimous — acceptance of late reservations.[361] Moreover, State practice shows that States formulate objections even if the 12-month period specified in article 20, paragraph 5, has ended.[362] Whatever uncertainties there may be regarding the "positive quality" of the rule with regard to general international law, the rule is retained by the Vienna Conventions and modifying it for the purposes of the Guide to Practice would undoubtedly give rise to more disadvantages than advantages.

216. The role of article 20, paragraph 5, is therefore twofold: on the one hand, it establishes the principle of tacit assent and the relationship between acceptance and

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[356] Footnote 317 above, p. 126.

[357] P.-H. Imbert, "A l'occasion de l'entrée en vigueur de la Convention de Vienne sur le droit des traites. Réflexions sur la pratique suivie par le Secrétaire général des Nations Unies dans l'exercice de ses fonctions de dépositaire", *Annuaire Français de Droit International (A.F.D.I.)*, vol. XXVI, 1980, pp. 524-541; G. Gaja, footnote 354 above, pp. 323-324; R. Riquelme Cortado, *Las reservas a los tratados: Lagunas y ambigüedades del régimen de Viena* (Universidad de Murcia, 2004), pp. 245-250; D. Müller, footnote 317 above, pp. 821-822, para. 48.

[358] *Summary of practice of the Secretary-General as depositary of multilateral treaties* (ST/LEG/8) (New York, 1997, United Nations publication, Sales No. E.94.V.15), p. 55, para. 185.

[359] The 90-day period continued to be applied, however, to the acceptance of late reservations for which unanimous acceptance by the contracting States is generally required (ibid., pp. 61-62, paras. 205-206).

[360] Ibid., pp. 54-55, paras. 184-187.

[361] Memorandum from the Legal Counsel of the United Nations addressed to the Permanent Representatives of States Members of the United Nations, 4 April 2000. See the fifth report on reservations to treaties (A/CN.4/508/Add.4), para. 322. The practice of the Council of Europe regarding the acceptance of late reservations, however, is to give contracting States a period of only nine months to formulate an objection (Jörg Polakiewicz, *Treaty-Making in the Council of Europe* (Council of Europe Publications, 1999), p. 102).

[362] See paras. 136-143 above.

objection and, on the other, it provides a time frame for the presumption of tacit acceptance. If a State does not object within a period of 12 months, it is presumed to have accepted the reservation. By the same token, article 20, paragraph 5, implicitly determines the time period within which an objection may be made.[363] Once this period ends, the State or international organization is considered to have accepted the reservation and can no longer validly object to it.[364]

217. Article 20, paragraph 5, can therefore be interpreted in two ways that are more complementary than opposing:

(a) On the one hand, it establishes a time limit for raising objections. From this perspective, the provision establishes the principle that it is impossible[365] for a State to raise objections after the end of the 12-month period[366] and, in this respect, seems to be no more than a simple provision relating to form applicable to the formulation of an objection.[367]

(b) On the other hand, it places a silent State, i.e. a State that has not raised any objections during the 12-month period, in the same situation as a State that has explicitly accepted the reservation. This acceptance, albeit tacit, produces the effects envisaged in article 20, paragraph 4 (a), and article 21, paragraph 1, of the Vienna Conventions, provided all the other conditions are met.

218. Sir Humphrey Waldock had noted the existence of these two approaches in treaty practice, but had hardly paid attention to the issue, simply stating that they "achieve the same result".[368] This is certainly true: in actual fact, they are two sides of the same coin, or two different ways of establishing concurrently that the objection constitutes the act that reverses the presumption of tacit consent and that,

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[363] See also paras. 125-129 above.

[364] The Secretary-General, as depositary of multilateral treaties, accepts objections formulated after the end of the 12-month period or, where applicable, the time limit prescribed in the treaty, but transmits them only as "communications" (see *Summary of practice ...*, footnote 358 above, p. 63; see also Palitha T. B. Kohona, "Some notable developments in the practice of the UN Secretary-General as depository of multilateral treaties: reservations and declarations", *American Journal of International Law*, vol. 99, 2005, p. 433, or "Reservations: discussion of recent developments in the practice of the Secretary-General of the United Nations as depositary of multilateral treaties", *Georgia Journal of International and Comparative Law*, vol. 33, 2004-2005, p. 444.

[365] See, however, paras. 136-144 above and draft guideline 2.6.15 (Late objections).

[366] This seems to be the interpretation given by P.-H. Imbert, footnote 325 above, p. 151.

[367] This solution was explicitly retained in article 8, paragraph 2, of the Convention on the Nationality of Married Women of 1957, which states the following: "... Any State Party to the Convention or which thereafter becomes a Party may notify the Secretary-General that it does not agree to consider itself bound by the Convention with respect to the State making the reservation. This notification must be made, in the case of a State already a Party, within ninety days from the date of the communication by the Secretary-General; and, in the case of a State subsequently becoming a Party, within ninety days from the date when the instrument of ratification or accession is deposited. In the event that such a notification is made, the Convention shall not be deemed to be in effect as between the State making the notification and the State making the reservation." Furthermore, an amendment proposed by Australia during the United Nations Conference on the Law of Treaties (A/CONF.39/C.1/166, *Documents of the Conference* (A/CONF.39/11/Add.2), footnote 335 above, p. 136) and later withdrawn (*Summary records* (A/CONF.39/11), footnote 344 above, 25th meeting, 16 April 1968, p. 135, para. 34) chose a similar solution by establishing a time limit of six months.

[368] First Report on the Law of Treaties (A/CN.4/144), footnote 330 above, p. 67, para. 14.

in order to have this effect, it must be raised within certain time periods. This is very much the spirit of article 20, paragraph 5, of the Convention.[369]

219. The situation of States and international organizations that are not already "contracting parties" when the reservation is formulated is very different to the situation of those that are and corresponds to the second scenario envisaged in article 20, paragraph 5, of the Vienna Conventions. This difference is due to the fact that they have until the date on which they express their consent to be bound by the treaty to raise an objection to a reservation, even if this is later than the date on which the 12-month period ends. This specific rule already appeared in J. L. Brierly's proposals,[370] but was not taken up by either H. Lauterpacht or G. G. Fitzmaurice or, curiously, retained by the International Law Commission in the articles adopted on first reading in 1962,[371] even though Sir Humphrey had included it in the draft article 18 presented in his 1962 report.[372] In the end, following the comments made by the Australian Government, it was reintroduced during the second reading.[373]

220. Even though it would appear that States and international organizations that are not already parties to the treaty when the reservation is formulated do not enjoy a period of reflection, unlike States and international organizations that are already parties to the treaty when the reservation in question is formulated, they are in no way at a disadvantage. Moreover, the solution ultimately retained in article 20, paragraph 5, of the Vienna Conventions is fully justified by the need for legal certainty. Indeed, granting such States a new period of reflection beginning on the date on which they ratify or accede to the treaty would put the reserving State back in an intermediate and uncertain status vis-à-vis the treaty and this does not seem admissible from the point of view of legal certainty. Furthermore, reservations formulated by other States are communicated to States and international organizations that are "entitled to become parties to the treaty" in exactly the same way that they are communicated to States and international organizations that are already parties to the treaty.[374] As a result, they usually have more than 12 months to consider the reservation that has been formulated and can therefore react at least when they express their consent to be bound by the treaty, if not before.[375] In any case, the phrase "whichever is later [the end of the period of 12 months or the date on which it expressed its consent to be bound by the treaty]" ensures that States and international organizations have at least one year to consider reservations.

221. The time period relating to implicit acceptance of a reservation by States or international organizations that are entitled to become parties to the treaty is, however, subject to an additional limitation when unanimous acceptance is required in order for the reservation to be established. A priori, article 20, paragraph 5, of the

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[369] See paras. 125-144 above and paras. 272-274 below.

[370] See para. 199 and footnote 328 above.

[371] Indeed, draft article 19, paragraph 3, presented in the Report of the Commission to the General Assembly concerned only implied acceptance in the strict sense of the word. See *Yearbook ... 1962*, vol. II, p. 176.

[372] A/CN.4/144, footnote 330 above, pp. 61-62.

[373] Fourth report on the law of treaties (A/CN.4/177), footnote 331 above, p. 45 and p. 53, para. 17.

[374] See article 23, paragraph 1, of the Vienna Conventions. See also the first paragraph of draft guideline 2.1.5 (Communication of reservations) and its commentary, *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 79-93.

[375] See paras. 76-84 above.

Vienna Conventions does not seem to oppose the application of the general rule in this case. However, this provision explicitly refers to article 20, paragraph 2 (treaties with limited participation), which requires unanimity. It is only logical that allowing States and international organizations that are entitled to become parties to the treaty but have not yet expressed their consent to be bound by the treaty when the reservation is formulated to raise an objection on the date that they become parties to the treaty (even if this date is later than the date on which the objection is notified) would have extremely damaging consequences for the reserving State and, more generally, for the stability of treaty relations. The reason for this is that in such a scenario it could not be presumed, at the end of the 12-month period, that a State that was a signatory of, but not a party to, a treaty with limited participation consented to the reservation and this would prevent unanimous acceptance, even if the said State had not formally objected to the reservation. The application of the presumption established in article 20, paragraph 5, would therefore have exactly the opposite effect to the one desired, i.e. the rapid stabilization of treaty relations and of the reserving State's status vis-à-vis the treaty.

222. This issue was addressed convincingly by Sir Humphrey Waldock in draft article 18 contained in his first report, which made a clear distinction between tacit acceptance and implicit acceptance in the case of multilateral treaties (which are subject to the "flexible" system), on the one hand, and plurilateral treaties (which are subject to the traditional system of unanimity), on the other. Indeed, paragraph 3 (c) of this draft article provided the following:

> A State which acquires the right to become a party to a treaty after a reservation has already been formulated[376] shall be presumed to consent to the reservation:
>
> (i) in the case of a plurilateral treaty, if it executes the act or acts necessary to enable it to become a party to the treaty;
>
> (ii) in the case of a multilateral treaty, if it executes the act or acts necessary to qualify it to become a party to the treaty without signifying its objection to the reservation.[377]

Sir Humphrey also noted, with reference to the scenario envisaged in paragraph 3 (c) (i) and in which unanimity remains the rule, that lessening the rigidity of the 12-month rule for States that are not already parties to the treaty

> is not possible in the case of plurilateral treaties because there the delay in taking a decision does place in suspense the status of the reserving State vis-à-vis all the States participating in the treaty.[378]

223. It follows that, wherever unanimity remains the rule, once a State or international organization accedes to the treaty, it may no longer validly object to a reservation that has already been unanimously accepted by the States and international organizations that are parties to the treaty. This does not mean, however, that the State or international organization loses its right to object to the

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[376] "Made" would undoubtedly be more appropriate, since if the period within which an objection can be raised following the formulation of a reservation has not yet ended, there is no reason why the new contracting State could not object (see para. 217 above).

[377] *Yearbook ... 1962*, vol. II, p. 61.

[378] Ibid., p. 67, para. 16 of the commentary.

reservation. It may simply not do so after the end of the 12-month period. If it accedes to the treaty after this, it can only consent to the reservation.

224. This specific issue, which characterizes the acceptance of reservations for which unanimity remains the rule, might be reflected in the following guideline:

2.8.2 Tacit acceptance of a reservation requiring unanimous acceptance by the other States and international organizations

A reservation requiring unanimous acceptance by the parties in order to produce its effects is considered to have been accepted by all the contracting States or international organizations or all the States or international organizations that are entitled to become parties to the treaty if they shall have raised no objection to the reservation by the end of a period of 12 months after they were notified of the reservation.

2. Form and procedure for express acceptances of reservations

225. As stated by Professor Don Grieg, "the ... acceptance of a reservation is, in the case of multilateral treaties, almost invariably implicit or tacit".[379] Nevertheless, it can be express, and there are situations in which a State expressly makes known the fact that it accepts the reservation.

226. The existence of the presumption of article 20, paragraph 5 of the Vienna Conventions in no way prevents States and international organizations from openly expressing their consent to reservations that have been made. This could appear arguable, at least in cases where a reservation does not satisfy the conditions of validity laid down in article 19 of the Vienna Conventions. The connection between a reservation's validity, on the one hand, and the possibility for States and international organizations to express, tacitly or openly, their consent to a reservation, on the other, does not require elucidation in the section of the Guide to Practice concerning procedure. Rather, it concerns the effects of reservations, acceptances and objections, which will be the subject of a later report. At this stage, it is sufficient to note in guideline 2.8.3:

2.8.3 Express acceptance of a reservation

A State or an international organization may, at any time, expressly accept a reservation formulated by another State or international organization.

227. Unlike reservations themselves as well as objections, express acceptances can of course be made at any time. This presents no obstacle for the reserving State, since a State or an international organization which does not expressly consent to a reservation would nevertheless be seen as having accepted it at the end of the 12-month period specified in article 20, paragraph 5, of the Vienna Conventions, for which guideline 2.8.1 specifies the legal consequences. Even a State or an international organization which had raised a prior objection to a reservation remains free to accept it expressly (or implicitly, by withdrawing its objection) at

[379] D. W. Grieg, footnote 314 above, p. 120. In the same sense, see also F. Horn, footnote 317 above, p. 124; Liesbeth Lijnzaad, *Reservations to United Nations Human Rights Treaties: Ratify and Ruin?* (Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1995), p. 46; R. Riquelme Cortado, footnote 357 above, pp. 211 ff; D. Müller, footnote 317 above, pp. 812 and 813, para. 27.

any later date.[380] This amounts to a complete withdrawal of the objection, one that has the same effect as an acceptance.[381]

228. In any case, despite these broad possibilities, State practice in the area of express acceptances is practically non-existent. One finds only a few very isolated examples, and even some of these are not without problems of their own.

229. An example often cited in the literature[382] is the acceptance by the Federal Republic of Germany of a French reservation, communicated on 7 February 1979, to the 1931 Convention providing a Uniform Law for Cheques. It should nevertheless be noted that this reservation on the part of the French Republic had been made late, some 40 years after France's accession to that Convention. The German communication[383] clearly states that the Federal Republic "raises no objections" to it[384] and thus clearly constitutes an acceptance.[385] The text of the communication from the Federal Republic of Germany does not clarify whether it accepted the deposit of the reservation despite its late formulation,[386] the content of the reservation itself, or both.[387]

230. There are other, less ambiguous cases as well: for example, the declarations and communications of the United States in reaction to the reservations made by Bulgaria,[388] the Union of Soviet Socialist Republics and Romania to article 21, paragraphs 2 and 3, of the 1954 Convention concerning Customs Facilities for Touring, in which it made clear that it had no objection to these reservations. The United States noted inter alia that it would apply the reservation reciprocally with respect to each of the States making reservations,[389] which, moreover, was its right

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[380] See para. 152 above, and draft guideline 2.7.1.

[381] See paras. 158-160 above.

[382] F. Horn, footnote 317 above, p. 124; R. Riquelme Cortado, footnote 357 above, p. 212.

[383] This communication was issued on 20 February 1980, more than 12 months after the notification of the reservation by the Secretary-General of the United Nations, depositary of the Convention. At that time, in any case, the (new) French reservation was "considered to have been accepted" by Germany on the basis of the principle of article 20, paragraph 5, of the Vienna Conventions. Furthermore, the Secretary-General had already considered the French reservation as having been accepted as of 11 May 1979, three months after its deposit.

[384] *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2005* (ST/LEG/SER.E/23), United Nations, New York, 2005, vol. II, pp. 581 and 582 (note 4) (chap. II, 11).

[385] In effect, provided that no objection has been raised, the State is considered to have accepted the reservation. See article 20, paragraph 5, of the Vienna Conventions, and para. 218 above.

[386] On this topic, see draft guideline 2.3.1 (Reservations formulated late) and its commentaries (*Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/56/10), pp. 477-489).

[387] The disadvantage of using the same terminology for both hypotheses was pointed out in the commentary to draft guideline 2.6.2 in *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), p. 202, para. 2 of the commentary, and in that to draft guideline 2.3.1 in ibid., *Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 489, para. 23 of the commentary. See also the eighth and ninth Reports on reservations to treaties, A/CN.4/535/Add.1, para. 101 and A/CN.4/544, para. 27, respectively.

[388] Bulgaria ultimately withdrew this reservation. See *Multilateral Treaties* ..., footnote 384 above, vol. I, p. 595 (note 15) (chap. XI.A.6).

[389] See *Multilateral Treaties* ..., footnote 384 above, vol. I, p. 595 (notes 15, 16 and 19) (chap. XI.A.6).

under article 21, paragraph 1 (b), of the Vienna Conventions.[390] A Yugoslav declaration concerning a reservation by the Soviet Union was similar,[391] but expressly referred to article 20, paragraph 7, of the Convention, relating to the reciprocal application of reservations.[392] That being said, and even if the American and Yugoslav declarations had been made out of a concern to emphasize the reciprocal application of the reservation and thus refer to article 20, paragraph 7, of the 1954 Convention, the fact remains that they indisputably constitute express acceptances. The same is true in the case of the American declarations regarding the reservations raised by Romania and the Soviet Union with relation to the 1949 Convention on Road Traffic[393] which are virtually identical to those of the United States concerning the Convention concerning Customs Facilities for Touring, despite the fact that the 1949 Convention does not include a provision comparable to article 20, paragraph 7, of the 1954 Convention.[394]

231. In the absence of a very developed practice in the area of express acceptances, one is forced to rely almost exclusively on the provisions of the Vienna Conventions and their *travaux préparatoires* to work out the principles and rules for formulating express acceptances and the procedures applicable to them.

232. Article 23, paragraph 1, of the 1986 Vienna Convention states that:

> A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

The *travaux préparatoires* for this provision were analysed in connection with draft guidelines 2.1.1 and 2.1.5;[395] that analysis was summarized in the commentaries to those drafts.[396] It is thus unnecessary to duplicate that general presentation, except to recall that the question of form and procedure for acceptance was touched upon only incidentally.

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[390] On the question of reciprocity of reservations, see D. Müller, commentary to article 21 (1969), footnote 317 above, pp. 901-907, paras. 30-38.

[391] See *Multilateral Treaties* ..., footnote 384 above, vol. I, p. 595 (note 19) (chap. XI.A.6).

[392] Article 20, paragraph 7, of the Convention concerning Customs Facilities for Touring in fact provides that "No Contracting State shall be required to extend to a State making a reservation the benefit of the provisions to which such reservation applies", and that "Any State availing itself of this right shall notify the Secretary-General accordingly".

[393] *Multilateral Treaties* ..., footnote 384 above, vol. I, p. 638 (note 17) (chap. XI.B.1). The Statements by Greece and the Netherlands concerning the Russian reservation are considerably less clear in that they limit themselves to specifying that the two Governments "do not consider themselves bound, with regard to the Soviet Union, by the provisions to which the reservation had been raised" (ibid.). Nevertheless, an acceptance could produce the same effect as a simple objection.

[394] Article 54, paragraph 1, of the 1949 Convention simply provides for the reciprocity of a reservation concerning article 52 (Settlement of disputes), without requiring a declaration to that effect on the part of States accepting the reservation.

[395] Sixth report on reservations to treaties, addendum (A/CN.4/518/Add.1), paras. 40-47.

[396] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 64-66, paras. (2) to (7) of the commentary to draft guideline 2.1.1 and pp. 81-85, paras. (5) to (11) of the commentary to draft guideline 2.1.5; as well as pp. 94-95 , paras. (3) and (4) of the commentary to draft guideline 2.1.6. See also paras. 87-91 above.

233. As with objections,[397] this provision places express acceptances on the same level as reservations themselves in matters concerning written form and communication with the States and international organizations involved. For the same reasons as those given for objections, it therefore suffices, in the framework of the Guide to Practice, to take note of this convergence of procedures and to stipulate, for the sake of clarity, the written form that an express acceptance takes by definition[398] in a specific draft guideline.

234. The following draft guidelines would appear to be sufficient for this purpose:

2.8.4 Written form of express acceptances

The express acceptance of a reservation must be formulated in writing.

2.8.5 Procedure for formulating express acceptances

Draft guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6, and 2.1.7 apply *mutatis mutandis* to express acceptances.

235. Draft guideline 2.8.5 is, in a sense, the counterpart of draft guideline 2.6.9 on objection procedure, and is based on the same rationale.[399] It clearly derives from the work of the International Law Commission, which resulted in the wording of article 23 of the Vienna Convention to the effect that reservations, express acceptances and objections are all subject to the same rules of notification and communication.[400]

236. Draft guideline 2.8.4 can in no way be considered superfluous. The simple fact that an acceptance is express does not necessarily mean that it is in writing. The written form is not only called for by article 23, paragraph 1, of the Vienna Conventions, upon whose wording draft guideline 2.8.4 is based, but also by the importance of acceptances to the legal regime, validity and effects of reservations to treaties. Although the various proposals of the Special Rapporteurs on treaty law never insist, in so many words, that express acceptances must be in writing, it can be seen from their work that they have always leaned towards the maintenance of a certain formality. Sir Humphrey's proposals and drafts thus require that express acceptances be made within the instrument, or by any other appropriate formal procedure, when a treaty is ratified or approved by the State concerned, or, in other cases, by formal notification;[401] this would require a written version in every case. Following the simplification and reworking of the articles concerning the form and procedure for reservations,[402] express acceptances and objections, the Commission

[397] See paras. 87-91 above.

[398] See para. 195 above, draft guideline 2.8, second paragraph.

[399] See paras. 87-94 above.

[400] See in particular the proposal of Mr. Rosenne, *Yearbook ... 1965*, vol. II, p. 73, and ibid., vol. I, 803rd meeting, 16 June 1965, pp. 197-199, paras. 30-56. See also *Yearbook ... 1966*, vol. II, p. 276, para. (1) of the commentary to draft article 73. For a summary of the work of the International Law Commission, see A. Pellet and W. Schabas, Commentary to article 23 (1969), *Les Conventions de Vienne ...*, footnote 317 above, p. 974, para. 5.

[401] See draft article 18, para. 2 (a) (iii) and (iv), in A/CN.4/144, footnote 144 above, p. 69; and draft article 20, paragraph 3, A/CN.4/177, footnote 331 above, p. 53, para. 13. See also draft article 19, para. 2, adopted by the Commission on first reading in 1962 (*Yearbook ... 1962*, vol. II, p. 176).

[402] See A. Pellet and W. Schabas, Commentary to article 23 (1969), *Les Conventions de Vienne ...*, footnote 317 above, p. 974, para. 5.

decided to include the issue of written form in paragraph 1 of draft article 20 (which became article 23, paragraph 1). The harmonization of provisions applicable to the written form and to the procedure for formulating reservations,[403] objections and express acceptances did not come up for discussion in the Commission[404] or at the Vienna Conference.[405]

237. Even though the practice of States with regard to the confirmation of express acceptances made prior to the confirmation of reservations is, in the view of the Special Rapporteur, non-existent, article 23, paragraph 3, of the Vienna Conventions[406] states clearly that:

> An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

238. As has already been noted with regard to the confirmation of objections,[407] common sense would indicate that express acceptances, which are clearly on an equal footing with objections in this regard, should be treated in the same way. One need only reproduce the provision of the Vienna Conventions in the Guide to Practice:

> **2.8.6 Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation**
>
> An express acceptance of a reservation made by a State or an international organization prior to confirmation of the reservation in accordance with draft guideline 2.2.1 does not itself require confirmation.

239. On the other hand, it would seem inappropriate to include in the Guide to Practice a draft guideline that would amount, with regard to the express acceptance of reservations, to a counterpart of draft guideline 2.6.12 on "Non-requirement of confirmation of an objection made prior to the expression of consent to be bound by the treaty":[408] not only is the idea of formulating an acceptance prior to the expression of consent to be bound by the treaty excluded by the very wording of paragraph 5 of article 20, which allows the formulation of acceptances only by contracting States or international organizations,[409] but also, in practice, it is difficult to imagine a State or international organization actually proceeding to such an acceptance. In any case, such a practice (which would be tantamount to soliciting reservations) should surely be discouraged, and would not serve the purpose of "preventive objections": the "warning" made in advance to States and international organizations seeking to formulate reservations unacceptable to the objecting State.

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[403] See para. 235 above.

[404] See *Yearbook ... 1965*, vol. I, 813th meeting, 29 June 1965, pp. 261-262, paras. 72-93, and 816th meeting, 2 July 1965, p. 284, paras. 54-55.

[405] See the report of the Committee of the Whole, A/CONF.39/14, *Documents of the Conference* (A/CONF.39/11/Add.2), footnote 335 above, pp. 138-139, paras. 190-196.

[406] For the *travaux préparatoires* for this provision, see para. 113 above.

[407] See above, para. 114.

[408] See above, para. 124.

[409] See above, para. 196.

3. Acceptance of reservations to the constituent instrument of an international organization

240. Under article 20, paragraph 3, of the Vienna Conventions, worded identically:

> When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

241. This provision originated in the first report of Sir Humphrey Waldock, who proposed a draft article 18, paragraph 4 (c), which reads as follows:

> In the case of a plurilateral or multilateral treaty which is the constituent instrument of an international organization, the consent of the organization, expressed through a decision of its competent organ, shall be necessary to establish the admissibility of a reservation not specifically authorized by such instrument and to constitute the reserving State a party to the instrument.[410]

The same idea is taken up in the fourth report of the Special Rapporteur, but the wording of draft article 19, paragraph 3, is simpler and more concise:

> Subject to article 3 (bis) [originally the current article 5], when a treaty is a constituent instrument of an international organization, acceptance of a reservation shall be determined by the competent organ of the international organization.[411]

242. The very principle of recourse to the competent organ of an international organization for a ruling on the acceptance of a reservation made regarding its constituent instrument was severely criticized at the 1969 Vienna Conference, in particular by the Soviet Union, which said that:

> Paragraph 3 of the Commission's article 17 should also be deleted, since the sovereign right of States to formulate reservations could not be made dependent on the decisions of international organizations.[412]

243. Other delegations, while less hostile to the principle of intervention by an organization's competent organ in accepting a reservation to its constituent instrument, were of the view that this particular regime was already covered by what would become article 5 of the Vienna Convention of 1969. That provision in effect makes the 1969 Vienna Convention applicable to the constituent instruments of international organizations "without prejudice to any relevant rules of the organization", including provisions concerning the admission of new members or

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[410] A/CN.4/144, footnote 330 above, p. 61. See also draft article 20, paragraph 4, adopted by the Commission on first reading, which restated the principle of intervention of the competent organ of an organization but which appeared to subsume it under cases in which an objection had effectively been raised against the reservation concerned (*Yearbook ... 1962*, vol. II, p. 176 and p. 181, para. 25 of the commentary to draft article 20).

[411] A/CN.4/177, footnote 331 above, p. 54.

[412] *Summary records* (A/CONF.39/11), footnote 344 above, 21st meeting, 10 April 1968, p. 107, para. 6.

the assessment of reservations that may arise.[413] Nevertheless, the provision was adopted by the Vienna Conference.

244. The *travaux préparatoires* of the 1986 Vienna Convention also clearly indicate that article 5 of the Convention and paragraph 3 of article 20 are neither mutually exclusive nor redundant. In effect, paragraph 3 of article 20 was only inserted into the 1986 Convention because the Commission finally decided, after much hesitation, to adopt a provision corresponding to article 5 of the 1969 Vienna Convention.[414]

245. On its own terms, recourse to the organ of an organization for acceptance of reservations formulated with regard to the constituent instrument of that organization is perfectly logical. The constituent instruments of international organizations are not subject to the flexible system.[415] Their main objective consists in the establishment of a new juridical person, in the framework of which the diversity of bilateral relations between States or organizations members is largely inconceivable. There cannot be numerous types of "membership", nor even less can there be numerous decision-making procedures. The usefulness of the principle is particularly obvious where a reserving State is considered a "member" of the organization by some of the other States members and, at the same time, as a third party in relation to the organization and its constituent instrument by other States having made a qualified objection opposing the entry into force of the treaty in their bilateral relations with the reserving State.[416] A solution of this sort, creating a hierarchy among or a bilateralization of the membership of the organization, would paralyse the work of the international organization in question and would thus be inadmissible. The Commission, basing itself largely on the practice of the Secretary-General in the matter, therefore rightly noted in its commentary to draft article 20, paragraph 4, adopted on first reading, that

> in the case of instruments which form the constitutions of international organizations, the integrity of the instrument is a consideration which outweighs other considerations and that it must be for the members of the organization, acting through its competent organ, to determine how far any relaxation of the integrity of the instrument is acceptable.[417]

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[413] See the Swiss amendment (A/CONF.39/C.1/L.97, *Documents of the Conference* (A/CONF.39/11/Add.2), footnote 335 above, p. 135) and the joint amendment by France and Tunisia (A/CONF.39/C.1/L.113, ibid.). See also interventions by France (*Summary Records* (A/CONF.39/11), footnote 344 above, 22nd meeting, 11 April 1968, p. 116, para. 16); by Switzerland (ibid., 21st meeting, 10 April 1968, p. 111, para. 40), by Tunisia (ibid., para. 45), and by Italy (ibid., 22nd meeting, 11 April 1968, p. 120, para. 77). Similarly, see P.-H. Imbert, footnote 325 above, p. 122; M. H. Mendelson, "Reservations to the Constitutions of International Organizations", *British Yearbook of International Law*, 1971, p. 151.

[414] *Yearbook ... 1982*, vol. II, Part 2, p. 36, para. 3 of the commentary to draft article 20. See also debates within the Commission, *Yearbook ... 1982*, vol. I, 1727th meeting, 15 June 1982, pp. 177-178.

[415] M. H. Mendelson has demonstrated that "[t]he charter of an international organization differs from other treaty regimes in bringing into being, as it were, a living organism, whose decisions, resolutions, regulations, appropriations and the like constantly create new rights and obligations for the members" (M. H. Mendelson, footnote 413 above, p. 148).

[416] See D. Müller, footnote 317 above, p. 854, para. 106; M. H. Mendelson, footnote 413 above, pp. 149 and 150-151.

[417] *Yearbook ... 1962*, vol. II, p. 181, para. 25 of the commentary to draft article 20.

246. Furthermore, it is only logical that States or member organizations should take a collective decision concerning acceptance of a reservation, given that they take part, through the competent organ of the organization, in the admissions procedure for all new members and must assess at that time the terms and extent of commitment of the State or organization applying for membership. It is thus up to the organization, and to it alone, and more particularly to the competent organ, to interpret its own constituent instrument and to decide on the acceptance of a reservation formulated by a candidate for admission.

247. This principle is confirmed, moreover, by the practice followed in the matter. Despite some indecision with regard to the practice of depositaries other than the Secretary-General of the United Nations,[418] the latter clearly set out his position in the case of the Indian reservation to the Convention of the Inter-Governmental Maritime Consultative Organization (IMCO).[419] On that occasion, it was specified that the Secretary-General "has invariably treated the matter as one for reference to the body having the authority to interpret the convention in question".[420] Unfortunately, there are very few examples of acceptances by the competent organ of the organization concerned in the collection of *Multilateral Treaties Deposited with the Secretary-General*, particularly as the depositary does not generally communicate acceptances. It is nonetheless worth noting that the reservations formulated by the Federal Republic of Germany and the United Kingdom to the Agreement establishing the African Development Bank as amended in 1979 were expressly accepted by the Bank.[421] Similarly, the French reservation to the 1977 Agreement establishing the Asia-Pacific Institute for Broadcasting Development was expressly accepted by the Institute's Governing Council.[422] Chile's instrument of ratification of the 1983 Statute of the International Centre for Genetic Engineering and Biotechnology also took effect on the date that the reservations formulated in respect of that instrument were accepted by the Centre's Board of Governors.[423]

248. There is no question that, in keeping with the Commission's practice, article 20, paragraph 3, of the Vienna Conventions should be reproduced in draft guideline 2.8.7 in order to stress the special nature of the rules applicable to the constituent instruments of international organizations with regard to the acceptance of reservations:

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[418] Thus, the United States always applied the principle of unanimity for reservations to constituent instruments of international organizations (see the examples given by M. H. Mendelson, "Reservations to the Constitutions of International Organizations", footnote 413 above, p. 149, and pp. 158-160, and P.-H. Imbert, footnote 325 above, pp. 122-123 (note 186)), while the United Kingdom embraced the Secretary-General's practice of referring the question back to the competent organ of the organization concerned (ibid., p. 121).

[419] See M. H. Mendelson, "Reservations to the Constitutions of International Organ", footnote 413 above, pp. 162-169, and P.-H. Imbert, footnote 325 above, pp. 123-125.

[420] See document A/4235, para. 21. See also *Yearbook ... 1965*, vol. II, p. 102, para. 22, and *Summary of Practice ...*, footnote 358 above, p. 59, paras. 197 and 198.

[421] *Multilateral Treaties ...*, vol. I, p. 543, notes 7 and 9 (chap. X, sect. 2.b).

[422] Ibid., vol. II, p. 407, note 4 (chap. XXV, sect. 3).

[423] Ibid., p. 73, note 5 (chap. XIV, sect. 7).

2.8.7 Acceptance of reservations to the constituent instrument of an international organization

When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

249. The provision in the Vienna Conventions, however, is barely more than a "safeguard clause"[424] that excludes the case of constituent instruments of international organizations, including the principle of tacit acceptance,[425] from the scope of the flexible system, while specifying that acceptance by the competent organ is necessary to "establish" the reservation within the meaning of article 21, paragraph 1, of the Vienna Conventions. As the Special Rapporteur already indicated in his first report, "article 20, paragraph 3, is far from resolving all the problems which can and do arise" with regard to the legal regime applicable to reservations to constituent instruments.[426] That leaves a number of questions unanswered: What is a constituent instrument of an organization? Which organ is competent to decide on whether to accept a reservation? What effect does acceptance by the competent organ have on the individual reactions of member States and international organizations?

250. Before attempting to reply to these various questions — to which an answer is not to be found in the Vienna Conventions — it should be specified that the acceptance expressed by the competent organ of an international organization with regard to a reservation to its constituent instrument cannot be presumed. Under article 20, paragraph 5, of the Vienna Conventions, the assumption that a reservation is accepted at the end of a 12-month period can apply only to the cases described in paragraphs 2 and 4 of that article. Thus, the case set out in article 20, paragraph 3, is excluded — which amounts to saying that, unless otherwise provided in the treaty (in this case, the constituent instrument of the organization), acceptance must necessarily be express.

251. In practice, even leaving aside the problem of the 12-month period required under article 20, paragraph 5, of the Vienna Conventions, which would be difficult, if not impossible, to respect, in certain organizations where the organs competent to decide on the admission of new members meet only at intervals of more than 12 months,[427] the absence of any position by the competent organ of the organization concerned would be quite inconceivable. In any case, an organ of the organization must take a position on the admission of a new member at one point or another; without such a decision, the State cannot be considered a member of the organization. Even if the State in question is not going to be admitted by a formal instrument of the organization but rather will simply adhere to the constituent instrument, article 20, paragraph 3, of the Vienna Conventions requires the competent organ to rule on the question. It is possible, however, to imagine cases in which the organ implicitly accepts the reservation and allows the candidate country

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[424] D. Müller, footnote 317 above, p. 858, para. 114.

[425] Article 20, paragraph 5, of the Vienna Conventions excludes from its scope the case of reservations to constituent instruments of international organizations, specifying that it applies solely to the situations referred to in paragraphs 2 and 4 of article 20.

[426] A/CN.4/470, para. 137.

[427] One example is the case of the General Assembly of the World Tourism Organization (WTO) which, under article 10 of its Statutes, meets every two years.

to participate in the work of the organization without formally ruling on the reservation.[428]

252. It would therefore seem useful to reiterate in a separate guideline that the presumption of acceptance does not apply to constituent instruments of international organizations, at least with regard to acceptance expressed by the competent organ of the organization:

2.8.8 Lack of presumption of acceptance of a reservation to a constituent instrument

For the purposes of applying guideline 2.8.7, acceptance by the competent organ of the organization shall not be presumed. Guideline 2.8.1 is not applicable.

253. The fact remains that neither the Vienna Conventions nor the *travaux préparatoires*[429] shed any light on what is to be understood by the term "constituent instrument of an international organization".

254. An international treaty whose sole object is to establish a new international organization and does no more than specify and determine strictly constitutional aspects of the new subject of law, as well as its structure and organization, unquestionably falls within the scope of article 20, paragraph 3, of the Vienna Conventions. Such a treaty constituting the "constituent instrument" of an international organization *stricto sensu* is very rare[430] and an exception to the rule.

255. The vast majority of treaties establishing international organizations actually do combine rules relating to the organization, structure and functioning of the organization, on the one hand, with material rules establishing specific obligations for the organization and/or its member States, on the other hand. Hence, the Charter of the United Nations contains provisions concerning the functioning, structure and procedures of the Organization on the one hand and material rules applicable to all States Members of the Organization, on the other hand — for example, Articles 1 and 2. This combination of provisions is even more striking in the United Nations Convention on the Law of the Sea[431] or the 1944 Convention on International Civil

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[428] See the example of the reservation formulated by Turkey to the IMCO Convention. This reservation was not officially accepted by the Assembly. Nonetheless, the Assembly allowed the Turkish delegation to participate in its work. This implied acceptance of the instrument of ratification and the reservation (William W. Bishop, "Reservations to Treaties", R.C.A.D.I., vol. 103, 1961-II, pp. 297-298; M. H. Mendelson, footnote 413 above, p. 163). Technically, this is not, however, a "tacit" acceptance as M. H. Mendelson seems to think (ibid.), but rather an "implicit" acceptance (see para. 189 above on the distinction).

[429] Neither the commentary on draft article 4 (*Yearbook ... 1966*, vol. II, p. 191), nor that on draft article 17, paragraph 3 (*Yearbook ... 1966*, vol. II, p. 207, para. 20), of the Commission contains a definition of the concept "constituent instrument of an international organization".

[430] See constituent instruments of the United Nations Educational, Scientific and Cultural Organization (UNESCO) (London, 16 November 1945), the Food and Agriculture Organization of the United Nations (FAO) (Quebec, 16 October 1945) and the constitutions of the Universal Postal Union (UPU) (Vienna, 10 July 1964) or the International Telecommunication Union (ITU) (Geneva, 22 December 1992).

[431] The problem of reservations does not arise, however, in the context of this Convention, owing to its article 309: "No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention". See also A. Pellet, "Les réserves aux conventions sur le droit de la mer", *La mer et son droit, Mélanges offers à Laurent Lucchini et Jean-Pierre Quéneudec* (Pedone, Paris, 2003), pp. 501-520.

Aviation (establishing the International Civil Aviation Organization (ICAO)), which established international organizations and, at the same time, contain many material provisions. The same problem arises for treaties which, while setting out material obligations for the States parties, establish oversight and implementing organs, particularly in the case of commodities conventions.[432]

256. The *ratio legis* of article 20, paragraph 3, of the Vienna Conventions, which avoids paralysing the functioning of the international organization, is not transposable as such to all the provisions of such a hybrid treaty. M. H. Mendelson thus proposes distinguishing between "'organizational' provisions" (provisions concerning the organization and structure [of the organization]) and "'substantive' ones".[433] While the former, which are strictly constitutional in nature, would thus be subject to the regime laid down in article 20, paragraph 3, of the Vienna Conventions, the latter exist or could exist independently of the constituent instrument and "would have a legal content even if the Organization did not exist";[434] consequently, according to the author, these material provisions should not be subject to the more restrictive regime laid down in article 20, paragraph 3, of the Vienna Conventions, unless the treaty in question provides otherwise.

257. In concrete terms, however, the distinction between the strictly constitutional provisions and the material provisions is not easy and, in the absence of any practice, it would be rash to advance a criterion that would make it possible to distinguish between the two. Furthermore, it is debatable whether a distinction should be made among the various provisions of the constituent instruments when article 20, paragraph 3, is referring only to the treaty itself. Hence, it is the view of the Special Rapporteur that there is no value in introducing a guideline that attempts to define the concept of "constituent instrument" of an international organization, and that it would make more sense to do no more than set out the difficulties of defining the concept in the commentary on draft guideline 2.8.7 or 2.8.8.

258. Nor is an answer to be found in either the *travaux préparatoires* or the Vienna Conventions themselves on the organ competent to decide on acceptance of the reservation. This is easily explained: it is impossible to determine in a general and abstract way the organ of an international organization that is competent to decide on the acceptance of a reservation. This question is covered by article 5 of the Vienna Conventions, which deals with the application of the provisions of the Conventions to constituent instruments of international organizations "without prejudice to any relevant rules of the organization". Thus, the rules of the organization determine the organ competent to accept the reservation, as well as the applicable voting procedure and required majorities. Generally, and given the circumstances in which the reservation can be formulated, it can be assumed that "competent organ" means the organ that decides on the reserving State's application for admission or, in the absence of a formal admissions procedure, the organ competent to interpret the constituent instrument of the organization. Thus, the Indian "reservation" to the IMCO Constitution — once the controversy over the

[432] These categories of constituent instruments were enumerated by S. Rosenne during the discussion of draft article 19, paragraph 3, from which the current article 20, paragraph 3, derives. *Yearbook of the International Law Commission*, 1965, vol. I, 798th meeting, 9 June 1965, p. 159, para. 44.

[433] M. H. Mendelson, footnote 413 above, p. 146.

[434] Ibid.

procedure to be followed[435] was over — was accepted by the IMCO Council under article 27 of the Convention[436] while the Turkish reservation to this Convention was (implicitly) accepted by the Assembly.[437] With regard to the American reservation to the Constitution of the World Health Organization (WHO), the Secretary-General addressed the WHO Assembly, which was, by virtue of article 75 of the Constitution, competent to decide on any disputes with regard to the interpretation of that instrument. In the end, the WHO Assembly unanimously accepted the American reservation.[438]

259. An indication in the Guide to Practice of how "competent organ" of the organization is to be understood for the purposes of applying article 20, paragraph 3, of the Vienna Conventions — the text of which should be reproduced in draft guideline 2.8.7 — would be helpful:

2.8.9 Organ competent to accept a reservation to a constituent instrument

The organ competent to accept a reservation to a constituent instrument of an international organization is the one that is competent to decide whether the author of the reservation should be admitted to the organization, or failing that, to interpret the constituent instrument.

260. A particular problem arises, moreover, in cases where the competent organ of the organization does not yet exist because the treaty has not yet entered into force or the organization has not yet been established. Who, in this case, should be deciding on the acceptability of the reservation?

261. This situation occurred with respect to the Convention establishing the International Maritime Organization (IMO)[439] — at the time still IMCO — to which some States had entered reservations or declarations in their instrument of ratification[440] or even the Constitution of the International Refugee Organization which the United States, France and Guatemala intended to ratify with reservations[441] before the respective constituent instruments of these two organizations had even entered into force. The Secretary-General of the United Nations, in his capacity as depositary of these Conventions and unable to submit the question of declarations and/or reservations to the organization (as it did not yet exist), decided to consult the States most immediately concerned, in other words, the States that were already parties to the Convention and, if there was no objection,

[435] See footnote 419 above.

[436] Under this provision, the Council assumes the functions of the organization if the Assembly does not meet.

[437] See para. 251 and footnote 428 above.

[438] On this case, see, in particular, M. H. Mendelson, footnote 413, pp. 161-162. For other examples, see para. 247 above.

[439] United Nations, *Treaty Series*, vol. 289, p. 3.

[440] See, in particular, the declarations of Switzerland, the United States, Mexico and Ecuador (*Multilateral Treaties* ..., footnote 384 above, vol. II, pp. 5-7 (chap. XII, sect. 2).

[441] These declarations are cited in P.-H. Imbert, footnote 325 above, p. 40 (footnote 6).

to consider the reserving States as members of the organization.[442]

262. Moreover, it should be noted that while article 20, paragraph 3, of the Vienna Conventions excludes the application of the "flexible" system for reservations to a constituent instrument of an international organization, it also prohibits a decision by the traditional system of unanimity. The Secretary-General's practice, however — which is to consult all the States that are already parties to the constituent instrument — is leaning in this direction. Had it been adopted, an Austrian amendment to this provision, submitted at the Vienna Conference, would have led to another solution:

> When the reservation is formulated while the treaty is not yet in force, the expression of the consent of the State which has formulated the reservation takes effect only when such competent organ is properly constituted and has accepted the reservation.[443]

This approach, which was not followed by the Drafting Committee at the time of the Conference,[444] was upheld by M. H. Mendelson, who believes, moreover, that "[t]he fact that [...] the instrument containing the reservations should not count towards bringing the treaty into force, is a small price to pay for ensuring the organization's control over reservations".[445]

263. The organization's control over the question of reservations is certainly an advantage of the solution advocated by the Austrian amendment. Nonetheless, the undeniable disadvantage of this proposal is that it leaves the reserving State in an undetermined status with respect to the organization, which can be very prolonged, until such time as the treaty enters into force. Thus, one might well wonder whether the practice of the Secretary-General is more reasonable. Indeed, asking States that are already parties to the constituent instrument to evaluate the reservation with a view to obtaining unanimous acceptance (no protest or objection) places the reserving State in a much more comfortable situation. Its status with respect to the constituent instrument of the organization and with respect to the organization as

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[442] M. H. Mendelson, footnote 413 above, pp. 162-163. In this same spirit, the United States, during the Vienna Conference, proposed replacing article 20, paragraph 3, with the following text: "When a treaty is a constituent instrument of an international organization, it shall be deemed to be of such a character that, pending its entry into force, and the functioning of the organization, a reservation may be established if none of the signatory States objects, unless the treaty otherwise provides." (See *Summary records* (A/CONF.39/C.1/L.3, footnote 344 above, A/CONF.39/11, 24th meeting, 16 April 1968, pp. 130-131, para. 54)). This amendment, which was not adopted, would have considerably enlarged the circle of States that might have made their views on this known.

[443] A/CONF.39/C.1/L.3, in *United Nations Conference on the Law of Treaties, Documents of the Conference* (A/CONF.39/11/Add.2), footnote 335 above, p. 135. A Chinese amendment was very much along these lines, but could have meant that the reserving State becomes a party to the instrument even so. It provided that "When the reservation is made before the entry into force of the treaty, the reservation shall be subject to subsequent acceptance by the competent organ after such competent organ has been properly instituted." (A/CONF.39/C.1/L.162, ibid., p. 135).

[444] M. H. Mendelson, footnote 413 above, pp. 152-153. See *Documents of the Conference* (A/CONF.39/11/Add.2), footnote 335 above, pp. 137-138 and 240.

[445] Ibid., p. 153.

such is much more rapidly determined.[446] What is more, it should be kept in mind that the organization's consent is nothing more than the sum total of acceptances of the States members of the organization. Requiring unanimity before the competent organ comes into being can, of course, be a disadvantage to the reserving State, since in most cases — at least, when it comes to international organizations with a global mandate — a decision will probably be taken by majority vote. Nonetheless, if there is no unanimity among the Contracting States or international organizations, there is nothing to prevent the author of the reservation from resubmitting its instrument of ratification and accompanying reservation to the competent organ of the organization once it is established.

264. Both solutions seem to have an identical result. The difference, however — and it is substantial — is that the reserving State is spared an intermediate and uncertain status until such time as the organization is established and its reservation can be examined by the competent organ. This is a major advantage for legal certainty. In absolute terms, it seems desirable, however, that during the negotiations, States or international organizations come to an agreement with a view to finding a modus vivendi for the period of uncertainty between the time of signature and the entry into force of the constituent instrument, for example, by transferring the competence necessary to accept or reject the reservations to the interim committee responsible for setting up the new international organization.[447]

265. It therefore seems useful to clarify this point in article 20, paragraph 3, of the Vienna Conventions in a guideline 2.8.10 which might read as follows:

> **2.8.10 Acceptance of a reservation to the constituent instrument of an international organization in cases where the competent organ has not yet been established**
>
> In the case set forth in guideline 2.8.7 and where the constituent instrument has not yet entered into force, a reservation requires the acceptance of all the States and international organizations concerned. Guideline 2.8.1 remains applicable.

266. Lastly, the influence of article 20, paragraph 3, of the Vienna Conventions on the right or power of other States to make individual observations, or accept or reject a reservation to the constituent instrument of an international organization must still be examined. In other words, does the competence of the organ of the organization to decide on whether to accept such a reservation preclude individual

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[446] The example of the Argentine reservation to the constituent instrument of the International Atomic Energy Agency (IAEA) shows that the status of the reserving State can be determined very rapidly and depends essentially on the depositary. The Argentine instrument was accepted after a period of only three months. See M. H. Mendelson, footnote 413 above, p. 160.

[447] This solution was envisaged by the Secretary-General of the United Nations in a document prepared for the Third United Nations Conference on the Law of the Sea. In this report, the Secretary-General stated that "before entry into force of the convention on the law of the sea, it would of course be possible to consult a preparatory commission or some organ of the United Nations" (A/CONF.62/L.13, *Official Records of the United Nations Conference on the Law of Treaties (third session)*, vol. VI, p. 128, footnote 26). For a brief discussion of the difficulty, in certain circumstances, of determining the "organ qualified to accept a reservation", see the second paragraph of draft guideline 2.1.5 (Communication of reservations) and its commentary (*Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 91-92, paras. 28 and 29 of the commentary).

reactions by other members of the organization? The question may seem odd. Why allow States to express their individual views if they are supposedly making a collective decision on acceptance of the reservation within the competent organ of the organization? Would it not give the green light to reopen the debate on the reservation, particularly for States that were not able to "impose" their point of view within the competent organ, and thereby to imagine a dual or parallel system of acceptance of such reservations that would in all likelihood create an impasse if the two processes had different outcomes?

267. During the Vienna Conference, the United States introduced an amendment to article 17, paragraph 3 (which became paragraph 3 of article 20), specifying that "such acceptance shall not preclude any Contracting State from objecting to the reservation".[448] Adopted by a slim majority at the 25th meeting of the Committee of the Whole[449] and incorporated by the Drafting Committee in the provisional text of article 17, this passage was ultimately deleted from the final text of the Convention by the Committee of the Whole "on the understanding that the question of objections to reservations to constituent instruments of international organizations formed part of a topic already before the International Law Commission [the question of relations between international organizations and States], and that meanwhile the question would continue to be regulated by general international law.[450] It became apparent in the work of the Drafting Committee that the formulation of the American amendment was not very clear and left open the question of the legal effects of such an objection.[451]

268. In actual fact, it is hard to understand why member States or international organizations cannot take individual positions on a reservation outside the framework of the international organization and communicate their views to interested parties, including to the organization. In all likelihood, these positions will probably have no particular legal effect; however, this is not an isolated case and the absence of a legal effect *stricto sensu* of such declarations does not rob them of their importance[452] — they provide an opportunity for the reserving State, in the first instance, and, afterward, for other interested States, to become aware of and evaluate the position of the State author of the unilaterally formulated acceptance or objection which, in the end, will doubtless be a useful contribution to the discussions within the competent organ of the organization. They might also form the basis for launching a "reserving dialogue" among the key players, or they could be taken into consideration, where appropriate, by a third party who might have to decide on the validity or scope of the reservation.

269. In view of these considerations, the Special Rapporteur believes that it would be useful to include in the Guide to Practice a draft guideline stating that the right of member States or international organizations of the organization to give an individual opinion on a reservation to a constituent instrument shall not be affected

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[448] A/CONF.39/C.1/L.127, *Documents of the Conference* (A/CONF.39/11/Add.2), p. 135, para. 179.iv.d.

[449] By 33 to 22, with 29 abstentions. *Summary records* (A/CONF.39/11), footnote 344 above, 25th meeting, 16 April 1968, p. 135, para. 32.

[450] *Documents of the Conference* (A/CONF.39/11/Add.2), footnote 335 above, pp. 137-138, para. 186.

[451] *Summary records* (A/CONF.39/11), footnote 344 above, 72nd meeting, 15 May 1968, pp. 425-426, paras. 4-14.

[452] See also para. 138 above on "preventive objections".

by the competence of the organ of the international organization to decide on acceptance of the reservation. Such a guideline is in no way contrary to the Vienna Conventions, which take no position on this matter.

270. In this spirit, draft guideline 2.8.11 could be rewritten as follows:

2.8.11 Right of members of an international organization to accept a reservation to a constituent instrument

Guideline 2.8.7 does not preclude the right of States or international organizations that are members of an international organization to take a position on the validity or appropriateness of a reservation to a constituent instrument of the organization. Such an opinion is in itself devoid of legal effects.

4. Irreversibility of acceptances of reservations

271. Unlike their treatment of objections,[453] neither the 1969 nor the 1986 Vienna Convention contains provisions concerning the withdrawal of the acceptance of a reservation. They neither authorize it nor prohibit it.

272. The fact remains that article 20, paragraph 5, of the Vienna Conventions and its *ratio legis* logically exclude calling into question a tacit (or implicit) acceptance through an objection formulated after the end of the 12-month time period stipulated in this provision (or of any other time period specified by the treaty in question): to allow a "regret" that would call into question the treaty relations between the States or international organizations concerned[454] to be expressed several years after the intervention of an acceptance that came about because a contracting State or an international organization remained silent on one of the "critical dates", would pose a serious threat to legal certainty. While States parties are completely free to express their disagreement with a reservation entered after the end of the 12-month time period (or of any other time period specified by the treaty in question), their late "objections" can no longer have the usual effects of an objection, as provided for in article 20, paragraph 4 (b), and article 21, paragraph 3, of the Vienna Conventions.[455] A comparable conclusion must be drawn with regard to the question of widening the scope of an objection to a reservation.[456]

273. There is no reason to approach express acceptances any differently. Without there being any need for an in-depth analysis of the effects of an express acceptance — which are no different from those of a tacit acceptance,[457] suffice it to say that, like tacit acceptances, the effect of such an acceptance would in theory be the entry into force of the treaty between the State or international organization author of the reservation and the State or international organization that has accepted it and even, in certain circumstances, between all States or international organizations that are parties to the treaty. It goes without saying that calling the

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[453] On the question of the withdrawal and amendment of objections to reservations, see paras. 145-180 above.

[454] See paras. 139-141 above.

[455] See draft guideline 2.6.15 (Late objections), para. 143 above.

[456] See para. 179 above, and draft guideline 2.7.9 (Prohibition against the widening of the scope of an objection to a reservation).

[457] The question of the effects of the acceptance of a reservation will be more fully developed in a subsequent report of the Special Rapporteur.

legal consequences into question a posteriori would seriously undermine legal certainty and the status of the treaty in the bilateral relations between the author of the reservation and the author of the acceptance. This is just as true, moreover, in the case where acceptance has been made expressly: even if there is absolutely no doubt that a State's silence in a situation where it should have expressed its view has legal effects by virtue of the principle of good faith (and, here, the express provisions of the Vienna Conventions), it is even more apparent when the State's position takes the form of a unilateral declaration; the reserving State, as well as the other States parties, can count on the manifestation of the will of the State author of the express acceptance.[458]

274. The dialectical relationship between the objection and the acceptance, introduced and affirmed by article 20, paragraph 5, of the Vienna Conventions,[459] and the framework for the objection mechanisms — which is aimed at stabilizing troubled treaty relations, in some sense, through the reservation — necessarily imply that acceptance (whether it is tacit or express) is final.

275. Thus, the Guide to Practice should include a draft guideline stressing the final and irreversible nature of acceptances:

2.8.12 Final and irreversible nature of acceptances of reservations

Acceptance of a reservation made expressly or tacitly is final and irreversible. It cannot be subsequently withdrawn or amended.

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[458] See also, mutatis mutandis, the first of the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), p. 367, para. 176).

[459] See D. Müller, footnote 317 above, para. 49, pp. 822-823; see also para. 207 above.

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By Mr. Alain Pellet, Special Rapporteur

Corrigendum

Paragraph 238, title of draft guideline 2.8.6

For objection *read* acceptance

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Second report on the obligation to extradite or prosecute (*aut dedere aut judicare*)

By Zdzislaw Galicki, Special Rapporteur

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I. Preface

1. The present report on the obligation to extradite or prosecute (*aut dedere aut judicare*) is the second report prepared by the Special Rapporteur on the topic in question. The preliminary report,[1] presented in 2006, was discussed by the members of the International Law Commission during its fifty-eighth session.

2. Since then, however, although the topic has been formally continued, around half of the members of the Commission have been replaced, as a result of the election held by the General Assembly in November 2006. Therefore, the Special Rapporteur is of the opinion that it is wise, and even necessary, to recapitulate in the present report the main ideas described in the preliminary report, as well as to summarize the discussion that took place both in the Commission and in the Sixth Committee in 2006. The old Latin maxim *repetitio est mater studiorum* seems to be applicable to the present case.

3. Furthermore, since different opinions were expressed by members of the Commission during last year's plenary debate, it seems necessary to obtain the views of the new members on the most controversial matters covered in the preliminary report before proceeding to a substantive elaboration of possible draft rules or articles concerning the obligation to extradite or prosecute. Consequently, in the present report, the Special Rapporteur will try to describe, or to repeat, some of the essential questions for the benefit mainly of the new members of the Commission in order to avoid any possible confusion in the future.

4. It also seems of crucial importance for the further work on the topic in question that a wider response be obtained from States on the issues identified by the International Law Commission in chapter III of last year's report. Up to now, only seven States have transmitted their comments and information concerning those issues.[2] This does not seem to constitute a sufficient basis for the formulation of definite conclusions as to the eventual codification of appropriate rules on the obligation to extradite or prosecute. A repetition of last year's request, to be addressed to States, seems necessary in these circumstances.

II. Introduction

5. At its fifty-sixth session, in 2004, the International Law Commission, on the basis of the recommendation of the Working Group on the Long-term Programme of Work, identified the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)" for inclusion in its long-term programme of work. A brief syllabus describing the possible overall structure and approach to the topic was annexed to that year's report of the Commission.[3] In its resolution 59/41, the General Assembly took note of the Commission's report concerning its long-term programme of work.

6. At its 2865th meeting, held on 4 August 2005, the Commission considered the selection of a new topic for inclusion in the Commission's current programme of work and decided to include the topic "The obligation to extradite or prosecute

[1] A/CN.4/571.

[2] See, in detail, A/CN.4/579 and paras. 61-72 below.

[3] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 362. For the syllabus on the topic, see the annex.

(*aut dedere aut judicare*)" on its agenda, and appointed Zdzislaw Galicki as the Special Rapporteur for the topic.[4] In paragraph 5 of its resolution 60/22, the General Assembly endorsed the decision of the Commission to include the topic in its programme of work.

7. It should be recalled that the topic in question appeared in the list of planned topics already at the first session of the Commission in 1949, but was largely forgotten for more than half a century until it was briefly addressed in articles 8 and 9 of the 1996 draft Code of Crimes against the Peace and Security of Mankind.[5] Those articles set out minimum contours of the principle of *aut dedere aut judicare* and the linked principle of universal jurisdiction. It is important to remember that the draft Code was largely a codification exercise of customary international law as it stood in 1996, rather than a progressive development of international law, as confirmed two years later with the adoption of the Rome Statute of the International Criminal Court.

8. In fact, "the obligation to extradite or prosecute" was reflected by the Commission even earlier in article 54 of the draft Statute for an International Criminal Court, adopted at its forty-sixth session in 1994[6] and submitted to the General Assembly as part of the Commission's report on the work of that session. However, the "obligation", as formulated in the 1996 draft Code, seems to be more general and wider than that contained in the earlier 1994 draft Statute.

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[4] Ibid., *Sixtieth Session, Supplement No. 10* (A/60/10), para. 500.

[5] The text of those provisions, as adopted by the Commission at its forty-eighth session, in 1996, and submitted to the General Assembly as part of the Commission's report on its work of that session, was the following:

Article 8. Establishment of jurisdiction. Without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17, 18, 19 and 20, irrespective of where or by whom those crimes were committed. Jurisdiction over the crime set out in article 16 shall rest with an international criminal court. However, a State referred to in article 16 is not precluded from trying its nationals for the crime set out in that article (*Yearbook of the International Law Commission 1996*, vol. II (Part Two), p. 27).

Article 9. Obligation to extradite or prosecute. Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in article 17, 18, 19 or 20 is found shall extradite or prosecute that individual (Ibid., at p. 30).

[6] *Article 54. Obligation to extradite or prosecute.* In a case of a crime referred to in article 20, subparagraph (*e*), a custodial State Party to this Statute which is a party to the treaty in question but which has not accepted the Court's jurisdiction with respect to the crime for the purposes of article 21, paragraph 1 (*b*) (i), shall either take all necessary steps to extradite the suspect to a requesting State for the purpose of prosecution or refer the case to its competent authorities for that purpose (*Yearbook ... 1994*, vol. II (Part Two), p. 65).

III. Preliminary report revisited: old and new questions for the newly elected members of the International Law Commission

A. Consideration of the topic at the fifty-eighth session of the International Law Commission

9. The preliminary report on the obligation to extradite or prosecute (*aut dedere aut judicare*)[7] was submitted by the Special Rapporteur to the fifty-eighth session of the International Law Commission. It was prepared by the Special Rapporteur as a very preliminary set of initial observations concerning the substance of the topic, marking the most important points for further consideration and including a very general road map for the future work of the International Law Commission in the field.

10. At the fifty-eighth session, the Commission considered the preliminary report of the Special Rapporteur, including the proposed preliminary plan of action.[8] In the debate it was suggested that the scope of the topic should be limited to the objective of the obligation, namely, to reduce cases of impunity for persons suspected of having committed international crimes by depriving them of "safe havens". It was proposed that the topic could be further limited to particular categories of crimes, such as those which were particularly grave and threatened the international community as a whole. It was also suggested that a distinction should be drawn between crimes under international law (defined in treaty instruments), and crimes recognized under international customary law, such as war crimes, genocide and crimes against humanity. There was general support for excluding crimes that were foreseen solely under national laws from the scope of the study.

11. It was observed, in addition, that a more limited form of the obligation existed in regard to treaty crimes. For instance, it was noted that many treaties, including the so-called sectoral conventions for the suppression of international terrorism, contained a more guarded formulation, namely, to submit the case to the competent authorities "for the purpose of prosecution", as opposed to an obligation "to prosecute". It was recalled that Governments typically resisted accepting an obligation "to prosecute" since the independence of prosecution was a cardinal principle in their national criminal procedures.

12. It was suggested that the Commission should focus on gaps in existing treaties, such as the execution of penalties and the lack of a monitoring system with regard to compliance with the obligation to prosecute. As regards the question of the existence of a customary obligation to extradite or prosecute, it was suggested that any such obligation would have to be based on a two-tier system, as in existing treaties, whereby certain States were given priority jurisdiction and other States would be obliged to exercise jurisdiction if the alleged offender was not extradited to a State having that priority jurisdiction.

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[7] A/CN.4/571.

[8] See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), paras. 214-232. For the summary of the debate, see especially paras. 220-229, on which this part of the present report is mostly based.

13. Concerning the obligation to extradite, it was pointed out that whether that obligation existed depended on the treaties made between the parties and on the circumstances. In addition, since crimes were typically defined very precisely in domestic laws, the question had to be whether there was an obligation to extradite or prosecute for a precisely defined crime in precisely defined circumstances. It was also noted that most of the complex issues in extradition were solved pragmatically. Some members considered that the obligation to extradite or prosecute had acquired a customary status, at least as far as crimes under international law were concerned. In the terms of a further view, the procedure of deportation was relevant to the topic.

14. Furthermore, it was proposed that the Commission could consider the practical difficulties encountered in the process of extradition, including: problems of the sufficiency of evidence, the existence of outdated bilateral and multilateral treaties and national laws allowing multiple grounds for refusal, limitations on the extradition of nationals and the failure to recognize specific safeguards for the protection of the rights of the extradited individual, particularly in situations where extradition could expose the individual to torture, the death penalty or even life imprisonment. It was also recalled that, in the situation of international crimes, some of the limitations on extradition were inapplicable.

15. Some members cautioned against considering the technical aspects of extradition law. What was specific to the topic and the precise meaning of the Latin maxim *aut dedere aut judicare* was that, failing an extradition, an obligation to prosecute arose. The focus, therefore, should be on the conditions for triggering the obligation to prosecute. The view was expressed that the Commission should not deal with all the collateral rules on the subject, which were linked to it but not necessarily part of it. It was also proposed that the focus should be limited to the elaboration of secondary rules.

16. A general preference was expressed for drawing a clear distinction between the concepts of the obligation to extradite or prosecute and that of universal criminal jurisdiction. It was recalled that the Commission had decided to focus on the former and not the latter, even if for some crimes the two concepts existed simultaneously. It was pointed out that the topic did not necessarily require a study in extraterritorial criminal jurisdiction. If the Commission were, nonetheless, to embark on a consideration of the concept of universal jurisdiction, it was suggested that the different kinds of universal jurisdiction, particularly whether it was permissive or compulsory, be considered. It was also considered worth contemplating whether such jurisdiction could only be exercised when the person was present in a particular State or whether any State could request the extradition of a person from another State on grounds of universal jurisdiction.

17. A suggestion was made that the topic should not include the "triple" alternative, involving the concurrent jurisdiction of an international tribunal, since the existing tribunals had their own *lex specialis* rules. According to another opinion, it would be necessary insofar as possible to favour that third path. It was suggested that the Special Rapporteur should undertake a systematic study of State practice, focusing on contemporary practice, including national jurisprudence.

18. On the question of the final form, while it was recognized that it was premature to consider the matter, a preference was expressed for the eventual formulation of a set of draft articles, although it was noted that if the Commission

were to conclude that the obligation existed only under international treaties, then a draft of a recommendatory nature would be more appropriate.

19. The Special Rapporteur decided, however, that in his second report he would propose — at least provisionally — to start the elaboration of the first provision dealing with the scope of application of future draft articles.

B. Specific issues on which comments of States would be of particular interest to the Commission

20. The Commission included in chapter III of its report on the fifty-eighth session, as usual, a list of specific issues on which comments from States would be of particular interest to the Commission. Among others, issues were identified concerning the obligation to extradite or prosecute (*aut dedere aut judicare*). The Commission declared that it would welcome any information that Governments might wish to provide concerning their legislation and practice with regard to the topic, particularly more contemporary ones. If possible, such information should concern:

(a) International treaties by which a State is bound, containing the obligation to extradite or prosecute, and reservations made by that State to limit the application of this obligation;

(b) Domestic legal regulations adopted and applied by a State, including constitutional provisions and penal codes or codes of criminal procedures, concerning the obligation to extradite or prosecute (*aut dedere aut judicare*);

(c) Judicial practice of a State reflecting the application of the obligation *aut dedere aut judicare*;

(d) Crimes or offences to which the principle of the obligation *aut dedere aut judicare* is applied in the legislation or practice of a State.[9]

The Commission added that it would also welcome any further information that Governments may consider relevant to the topic.[10]

C. Discussion on the obligation to extradite or prosecute held in the Sixth Committee during the sixty-first session of the General Assembly

21. The present section of the second report is based mainly on the document entitled "Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-first session, prepared by the Secretariat".[11] The Special Rapporteur decided to retain the systematic arrangement of this part of the

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[9] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 30.

[10] Ibid., para. 31.

[11] A/CN.4/577. The Special Rapporteur would like to express his gratitude to the Secretariat for its very active assistance in collecting and systematizing materials necessary for the preparation of the present report.

topical summary — together with the subheadings used by the Secretariat — through which the views and opinions of the delegations in the Sixth Committee are presented in a much clearer and more transparent manner. Because of the small number of written observations received from States in response to the request contained in chapter III of last year's report of the Commission, the opinions expressed by the delegations in the Sixth Committee gain special importance as a means to present the views of States and their practice concerning the topic in question.

1. General comments

22. During the sixty-first session of the General Assembly, delegations in the Sixth Committee welcomed the first report of the Special Rapporteur and some endorsed the general approach taken in the report. Some delegations were of the view that the Commission should first undertake an analysis of the relevant treaties, national legislation and practice, and it was suggested that the Secretariat could assist the Special Rapporteur in such a task.

2. Scope of the topic

23. Support was expressed for the cautious approach advanced in the Commission with regard to the scope of the topic. However, according to another view, the topic should have been part of a broader study on jurisdiction. While it was proposed that the Commission also examine extradition procedures, the opinion was expressed that it should not undertake a review of extradition law and deportation. Some delegations invited the Commission to examine the related principle of universal jurisdiction, or at least the relationship between the topic and the principle.

24. Other delegations, while recognizing the link between universal jurisdiction and the obligation to extradite or prosecute, were of the view that the Commission should focus on the latter. It was suggested that the question of universal jurisdiction and the definition of international crimes deserved to be considered as separate topics. It was also proposed that the Commission examine the relationship between the obligation to extradite or prosecute and the principles of State sovereignty and human rights protection.

3. Customary law nature of the obligation

25. It was suggested by some delegations that the Commission should determine whether the obligation to extradite or prosecute had become part of customary international law. Should that be the case, the Commission would need to specify the offences to which the obligation would apply. It was also remarked that the customary nature of the obligation would not necessarily follow from the existence of multilateral treaties imposing such an obligation.

26. The opinion was expressed that the principle *aut dedere aut judicare* was not part of customary international law and that it certainly did not belong to *jus cogens*. In any event, it was observed that if the obligation had become part of customary international law, that would be true only in respect of a limited number of crimes.

27. According to another view, the principle *aut dedere aut judicare* had started to shape States' conduct beyond the obligations arising from international treaties with regard to the most heinous international crimes. It was also believed that in certain

areas, such as counter-terrorism, the obligation to extradite or prosecute was accepted by the whole international community.

28. It was further suggested that the Commission should concentrate more on the progressive development of international law, which could be an alternative solution if the codification process could not find sufficient substantial background in applicable customary rules.

4. Scope and content of the obligation

29. A number of delegations expressed support for the approach taken by the Special Rapporteur, according to which the obligation to extradite or prosecute gave States the choice to decide which part of the obligation they were willing to fulfil. However, the point was also made that the obligation to extradite or prosecute presupposed a choice that did not always exist in practice. In that respect, it was suggested that the Commission consider situations in which a State could not or did not extradite an offender. It was considered that the obligation to extradite or prosecute presupposed the presence of the suspect in the territory of the State. It was also observed that the Commission should offer guidance to States as to whether they should extradite or prosecute.

30. The opinion was expressed that the Commission should determine which States should have priority in exercising jurisdiction. In that regard, it was suggested that preference should be given to the State in whose territory the crime had been committed and that priority jurisdiction entailed an obligation to exercise such jurisdiction and to request extradition for that purpose.

5. Crimes covered by the obligation

31. It was suggested that the obligation to extradite or prosecute should be limited to crimes that affect the international community as a whole. In particular, it was considered that the principle would apply to crimes recognized under customary international law as well as serious offences covered by multilateral treaties, such as those relating to the hijacking of aircraft, narcotic drugs and terrorism. It was further noted that the obligation should apply to serious international and transnational crimes, including war crimes, crimes against humanity, genocide, torture and terrorist acts. Moreover, other delegations raised doubts as to the appropriateness of distinguishing, in that context, between crimes recognized under customary international law and crimes defined under treaty law.

32. Different opinions were expressed as to whether the obligation to extradite or prosecute was applicable only to crimes that were covered by the principle of universal jurisdiction, with some delegations favouring that narrower view and others questioning such a limitation. In that context, it was considered that the obligation to extradite or prosecute should first and foremost relate to crimes for which universal jurisdiction already existed.

33. Furthermore, the view was expressed that the obligation to extradite or prosecute should also apply to serious crimes under domestic law that caused significant harm to the State and the public interest of its people. According to another view, crimes that were defined only in domestic legislation should be excluded from the topic.

(a) Link with universal jurisdiction

34. It was noted that the principle of universal jurisdiction was instrumental to the full operation of the obligation to extradite or prosecute. It was also observed that a State might not be in a position to extradite if there was no treaty between the requested and the requesting State or if the requirement of double criminality was not met, there being at the same time an inability to prosecute because of the lack of jurisdiction.

(b) Surrender of suspects to international criminal tribunals

35. Some delegations referred to the surrender of suspects to an international criminal tribunal as a possible additional option to the alternative offered by the principle *aut dedere aut judicare*. While some delegations emphasized the role of international criminal tribunals in that context, other delegations were of the view that the Commission should not examine the surrender of suspects to such tribunals, which was governed by distinct legal rules.

(c) National legislation and practice

36. In providing details on national legislation, some delegations indicated that laws were being or had been passed in order to implement the obligation to extradite or prosecute, in particular with respect to international crimes such as genocide, war crimes, crimes against humanity and torture. However, it was pointed out that some domestic laws on extradition did not provide for the obligation to extradite or prosecute. Other national laws might not allow extradition in the absence of a bilateral extradition treaty, or restrictions imposed upon the extradition of nationals or persons who had been granted political asylum. The extradition of nationals was subject to several limitations relating to the type of crime and the existence of reciprocity established by treaty, as well as the condition that a fair trial should be guaranteed by the law of the requesting State.

37. Attention was also drawn to the existence of bilateral extradition agreements which did not provide for the obligation to extradite or prosecute, and to sectoral conventions on terrorism containing limitations on extradition that could be incompatible with the obligation to extradite or prosecute.

38. It was further observed that reservations to multilateral treaties containing the obligation to extradite or prosecute had been made in line with national legislation prohibiting extradition on political grounds or for crimes which would attract unduly severe penalties in the requesting State, with the exclusion, however, of crimes recognized under customary international law such as genocide, crimes against humanity and war crimes.

(d) Final outcome of the work of the Commission

39. Some delegations observed that the final outcome of the work of the Commission on the topic should be determined at a later stage. Without prejudice to a final decision on the matter, other delegations supported the idea of a set of draft rules.

D. Concluding remarks of the Special Rapporteur on the debate of the International Law Commission and the Sixth Committee on the preliminary report

40. Introducing the preliminary report, the Special Rapporteur stressed that his text was, in fact, a very preliminary set of initial observations concerning the substance of the topic, marking the most important points for further consideration and including a very general road map for the future work of the International Law Commission in the field. It was the intention of the Special Rapporteur to include in the preliminary report as many difficult problems and questions as possible in order to obtain answers and suggestions, first from the members of the Commission and later from the delegations in the Sixth Committee.

41. The members of the Commission and the delegations in the Sixth Committee have taken into account that specific nature of the "preliminary report", and their comments were aimed at the main issues to be considered by the Commission and the Special Rapporteur in their future work on the topic in question. As far as the Special Rapporteur is concerned, those opinions will be of great value and assistance for him in the process of preparation of subsequent reports, in which draft rules concerning the concept, structure and operation of the obligation *aut dedere aut judicare* will be gradually formulated.

42. There was, however, a great variety of opinions, remarks and suggestions expressed by the members of the Commission, as well as by the delegations in the Sixth Committee, during the debate on the topic in question, which dealt both with the substance and the formal aspects of the present exercise, starting with the very title of the topic and ending with the choice of the final form of the result of the work of the Commission in the field.

43. With regard to the title of the topic, although the view was expressed that it should be changed — referring, for instance, to the "principle", instead of the "obligation", to extradite or prosecute — the Special Rapporteur is of the opinion that, at least at the present stage, the current title should be retained. The concept of the "obligation" *aut dedere aut judicare* seems to provide safer grounds for further analysis than that of "principle". It does not exclude, of course the possibility of, or even need for — as was suggested by some members — consideration of the parallel question of the right of States to extradite or prosecute as a kind of counterbalance to the obligation.

44. There was a rather general consensus among the participants in the debates that the scope of the work on the topic in question should be limited as far as possible to, and should concentrate on, the main issues directly connected with the obligation to extradite or prosecute and the principal elements of this obligation, namely, "*dedere*" and "*judicare*".

45. The Special Rapporteur agrees with those suggestions, especially as regards the call for a very careful treatment of the mutual relationship between the obligation to extradite or prosecute and the principle of universal jurisdiction. It seems that the distinction between universal jurisdiction and the obligation *aut dedere aut judicare* should be clearly drawn. In that regard, the Special Rapporteur would like to add that the definitions of "universal jurisdiction" and the "*aut dedere aut judicare* rule" quoted in the preliminary report should be considered only

examples of a possible approach, without any prejudice to the preferences of the Special Rapporteur.

46. A more detailed analysis of the above-mentioned elements of the obligation in question seems necessary, especially as regards "*judicare*", since the scope of the obligation to prosecute binding upon States may be questioned and understood in different ways, even on the basis of existing treaties. When analysing the obligation "to prosecute", it will be necessary to establish to what extent international law, domestic legislation and practice actually impose the implementation of that duty.

47. Furthermore, the obligation of "*dedere*" may also cause some difficulty, as regards, for instance, the possibility raised by the Special Rapporteur (but questioned by one member of the Commission) that the substantive scope of extradition should be extended to the enforcement of a judgement. That possibility and procedure, however, are provided for under certain internal legislations.[12] The Special Rapporteur agrees with the observation that, in the case of crimes covered by the obligation *aut dedere aut judicare*, the application of some limitations traditionally imposed on extradition may raise problems or may even be impossible. Consequently, that question will require careful consideration by the Special Rapporteur and by the Commission. The Special Rapporteur agrees, however, with the view that the Commission should not consider the technical aspects of extradition law and rather should concentrate on the conditions for the triggering of the obligation in question.

48. Moreover, as was correctly noted by members of the Commission, the question of the so-called "triple alternative", raised by the Special Rapporteur in connection with the jurisdiction of international criminal tribunals, should be dealt with very carefully and in a very limited manner. As was, for instance, stressed by some members, the distinction between extradition and surrender to the International Criminal Court should be clearly identified.

49. As regards the suggested form of the final result of the work of the Commission on the topic in question, the majority of the participants in the debate were of the opinion that the most suitable form would probably be that of "draft articles", although it was admitted that it may still be too early to make any definite decision on the matter. However, on the basis of that opinion, the Special Rapporteur, in the reports that he will subsequently prepare, has decided to proceed in the direction of gradually formulating draft rules concerning the concept, structure and operation of the obligation *aut dedere aut judicare*.

50. Another important problem, which was raised by practically all speakers and which seems to have a crucial significance for the final result of the work of the Commission, is that of the legal background of the obligation under discussion. With regard to the proposal made in the preliminary report "to find a generally acceptable answer to the question if the legal source of the obligation should be limited to the treaties which are binding on the States concerned, or be extended to

[12] See, for instance, the Act of 6 June 1997, Code of Criminal Procedure of the Republic of Poland, which in article 593, para. 1, contemplates the possibility of "petitions for extradition by a foreign State of a person against whom criminal proceedings have been instituted for extradition in order to conduct judicial proceedings or enforce the imposition of the penalty of deprivation of liberty". Similarly, article 602 of the same Code also envisages requests of an authority of a foreign State for "the extradition of a prosecuted person in order to conduct criminal proceedings against him, or to execute a penalty or a preventive measure previously imposed".

appropriate customary norms or general principles of law",[13] the response given by the members of the Commission and the delegations in the Sixth Committee was rather cautious, generally recognizing that treaties could constitute a basis for such an obligation, but expressing some doubts as regards its support in customary norms.

51. In connection with the sources of the obligation to extradite or prosecute, one member criticized the separation, in the preliminary report, of the section devoted to international custom and general principles of law from the other one concerning national legislation and practice of States. The Special Rapporteur would like to explain that the latter question was identified separately within the part of the report concerning the sources of the obligation to extradite or prosecute with the intention to stress the importance of national legislative, executive and judicial practice of States in the process of formulation of the obligation in question. Furthermore, as was stressed by another participant in the debate, national laws and practice fill some gaps left by international regulations. It was also observed that the Special Rapporteur should not forget that the topic under study is directly linked with domestic criminal law systems. The Special Rapporteur fully agrees with the latter two observations.

52. The above does not contradict in any way, however, the need for such domestic practice to be present for customary rules of international law to exist, in accordance with article 38 of the Statute of the International Court of Justice. At that stage, in the preliminary report, it was impossible to reflect a full variety of examples of such State practice, a task that — undoubtedly — the Special Rapporteur will have to undertake later.

53. The Special Rapporteur fully agrees with the suggestion expressed by many members of the International Law Commission and delegations in the Sixth Committee that a thorough analysis of the topic in question should take into account international and national judicial decisions to a much wider extent than was done in the preliminary report. Once again, the Special Rapporteur would like to assure members of the Commission that the limited number of examples of judicial decisions described in his report of last year was only due to the preliminary nature of that report, and definitely not his detracting from the importance of those decisions.

54. An overwhelming majority of members of the International Law Commission and delegations in the Sixth Committee took a rather reserved position concerning the recognition, at least at the present stage, of the existence of a generally binding customary obligation to extradite or prosecute applicable to all offences under criminal law. However, they seemed to be supportive of the idea of a more selective approach, namely, the identification of certain categories of crimes for which universal jurisdiction and the principle *aut dedere aut judicare* have already received general recognition from States. A variety of terms is used in international practice to designate such crimes, including "international crimes", "serious international crimes", "crimes under international law", "crimes of international concern" and "crimes against humanity".

55. Bearing in mind this diversification of crimes or offences, the Special Rapporteur agrees with the numerous proposals that such categories of specific

[13] A/CN.4/571, para. 40.

crimes be identified, since they could be considered — because of their conventional or customary nature — as a basis for the possible application of the obligation to extradite or prosecute.

56. It seems to be much easier and more effective to formulate some legal rules, in the form of codification or of progressive development of international law, for the crimes so selected than to do it, in a general way, for all crimes and offences. That does not exclude, of course, the possibility of developing, at a later stage, if so decided by the Commission, rules or principles of a more general character.

57. A majority of the members who participated in the debate agreed with the suggestion, made by the Special Rapporteur in the last point of the preliminary plan of action,[14] that the present exercise should also include an analysis of the relation between the obligation to extradite or prosecute and other principles of international law. Some of those principles were identified and proposed by the Special Rapporteur for comparative consideration in the preliminary report.

58. There was, however, a significant difference of opinion concerning the substantive scope of the principles to be taken into account. It seems that, in general, there was consensus that the principle of human rights protection should be followed during all work on the topic in question and that specific attention should be paid therein to human rights law.

59. The Special Rapporteur agrees with those suggestions, as well as with the more general proposal that the elaboration of possible rules in the field should be limited rather to rules of a secondary character than to an attempt to formulate principles of a primary nature. The Special Rapporteur is full of appreciation for the many friendly warnings received from those members who participated in the debate on how to avoid the numerous traps awaiting him in his future work. He hopes that he will manage to avoid these traps, thanks to the active and friendly assistance of, and cooperation with, other members of the Commission.

60. The Special Rapporteur is also grateful for the general support, received during the debate, for his proposal to submit to Governments a written request for information concerning their practice, particularly the most contemporary, with regard to the obligation *aut dedere aut judicare*. It seems that the questions raised by the Special Rapporteur in paragraph 59 of his preliminary report, and included in the relevant section of chapter III of the report of the International Law Commission on the work of its fifty-eighth session (a chapter that traditionally deals with specific issues on which comments would be of particular interest to the Commission), will finally lead to more complete responses from States.

E. Comments and information received from Governments

61. In response to the specific issues on which comments of States would be of particular interest to the Commission, identified by the Commission in chapter III of last year's report,[15] some States have already sent their written responses, which have been put together by the Secretariat in a special document entitled "The obligation to extradite or prosecute (*aut dedere aut judicare*): comments and

[14] A/CN.4/571, para. 61, point 10.

[15] See para. 20 above.

information received from Governments".[16] As with the "Topical summary" described above,[17] the Secretariat has performed a very useful analytical work, gathering the information received from States in substantive categories.

62. The responses from Governments have been organized by the Secretariat around four clusters of information, concerning:

(a) International treaties by which a State is bound, containing the obligation to extradite or prosecute (*aut dedere aut judicare*), and reservations made by that State to limit the application of this obligation;

(b) Domestic legal regulations adopted and applied by a State, including constitutional provisions and penal codes of criminal procedures, concerning the obligation to extradite or prosecute;

(c) Judicial practice of a State reflecting the application of the obligation *aut dedere aut judicare*;

(d) Crimes or offences to which the principle of the obligation *aut dedere aut judicare* is applied in the legislation or practice of a State.

63. As was mentioned before, a limited number of responses were received from States: as at 1 March 2007, written observations, containing relevant comments and information, had been received from the following seven States: Austria, Croatia, Japan, Monaco, Qatar, Thailand and the United Kingdom of Great Britain and Northern Ireland. Although the amount of information received is rather small, it allows for some observations and comparisons concerning the four clusters mentioned above.

1. International treaties containing the obligation *aut dedere aut judicare*

64. All responding States confirmed their interest in and commitment to entering into treaties, both bilateral and multilateral, which establish an obligation *aut dedere aut judicare*. All responding States, except Austria, presented a rather lengthy list of multilateral treaties, to which they are parties, providing for the obligation *aut dedere aut judicare*.[18] Among those treaties a leading role seems to be played by numerous conventions, both universal and regional, dealing with the suppression and prevention of various forms of terrorism. Some States, such as Austria and Japan, have stressed that they have made no reservations to the relevant multilateral treaties limiting the application of the obligation *aut dedere aut judicare*.

65. In the realm of bilateral treaties a prevailing position is taken by extradition treaties. Some responding States placed particular emphasis on the bilateral treaties containing an obligation *aut dedere aut judicare* (Austria, Monaco).

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[16] A/CN.4/579.

[17] See paras. 21-39 above.

[18] Those instruments are, to a great extent, the treaties and conventions listed by the Special Rapporteur (following a memorandum by Amnesty International) in his preliminary report. See A/CN.4/571, para. 37.

2. Domestic legal regulations

66. The relevant domestic regulations providing for the obligation to extradite or prosecute from some of the above-mentioned seven States were already summarized by the Special Rapporteur in the preliminary report. For instance, Austrian domestic regulations, following the 1803 legislation, includes provisions reflecting the principle *aut dedere aut judicare* in connection with universal jurisdiction.[19]

67. Other States that have presented their observations on their domestic legislations concerning the obligation to extradite or prosecute put special emphasis on the circumstances and conditions for the possible application of that obligation. As was noted, for example, by Monaco, according to its legislation:

(a) The application of the principle *aut dedere aut judicare* is linked closely to the various grounds for refusal of extradition on which the requested State can rely;

(b) The principle *aut dedere aut judicare* is implemented when extradition is refused because of the nationality of the alleged offender;

(c) The principle *aut dedere aut judicare* will be applied only when the Courts of Monaco have jurisdiction over foreigners for offences committed abroad.

68. Finally, some States, for instance, the United Kingdom, declared that they do not have any specific legal regulations concerning the obligation to extradite or prosecute. However, on the other hand, the United Kingdom has several statutory provisions establishing jurisdiction for specified crimes, thus enabling the relevant national authorities to prosecute offences, when there is implementing legislation for the international treaties by which the United Kingdom is bound. Furthermore, domestic legislation allows the United Kingdom to extradite for trial when requested by another party to an international convention and where the conduct in question is covered by the provisions of that convention.[20]

3. Judicial practice

69. There was a very broad range of different answers regarding the judicial practice of States reflecting the application of the obligation *aut dedere aut judicare*. On the one hand, as was stated by the Austrian authorities, the principle *aut dedere aut judicare* plays a crucial role in Austrian practice. On the other hand, Thailand indicated "no" in response to the question regarding judicial practice. Similarly, Monaco has identified no specific judgement concerning the direct application of the principle *aut dedere aut judicare*.

70. In Austria, the Public Prosecutor, on the basis of the relevant provisions of the Austrian Penal Code,[21] has to examine the institution of proceedings in the country if the extradition of a suspect cannot be granted for reasons other than the nature or characteristics of the offence. However, no court decisions instituting proceedings in Austria following the refusal of extradition explicitly refer to the above-mentioned provisions. Therefore, the lack of court decisions seems to weaken the importance of the principle *aut dedere aut judicare* in Austrian judicial practice.

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[19] See A/CN.4/571, para. 44.

[20] See section 193 of the Extradition Act of 2003.

[21] See section 65, para. 1, No. 2, reflecting the principle *aut dedere aut judicare* in connection with universal jurisdiction.

71. Also, in the judicial practice of the United Kingdom, the nature of the obligation to extradite or prosecute was discussed only in the litigation surrounding the extradition of General Pinochet,[22] without any direct reference to the obligation in specific judgements.

4. Crimes or offences

72. The identification of crimes or offences to which the principle of the obligation *aut dedere aut judicare* is applied in the legislation or practice of the above-mentioned States mostly makes no special distinction between certain categories of offences. Consequently:

(a) In Austria, all crimes and offences punishable under the Austrian Penal Code are subject to the obligation;

(b) In Croatia, the obligation *aut dedere aut judicare* is applicable to all criminal offences;

(c) In the Japanese judicial system, the obligation to extradite or prosecute stipulated by the relevant treaties concluded by Japan is implemented on the basis of the Law of Extradition, the Penal Code and other related laws and regulations;

(d) In Monaco, following articles 7 to 10 of the Code of Penal Procedure, the principle *aut dedere aut judicare* may be implemented in various cases, including crimes against State security, counterfeiting, crimes or offences against diplomatic, consular or national premises, and torture;

(e) In the United Kingdom, the principle to extradite or prosecute applies to the following crimes: torture, hostage-taking, certain offences against civil aviation and maritime safety and specified terrorist offences.

IV. Draft rules on the obligation to extradite or prosecute: starting point

A. Scope of application of the draft articles

73. The Special Rapporteur is of the opinion that one of the aims of the second report, as was the case with the preliminary report, is to encourage and continue a discussion in the International Law Commission on both methodological and substantive issues, in particular concerning the scope of the topic.

74. In connection with the scope of the topic, it seems necessary also to decide if special attention should be paid to the link between the principle of universal jurisdiction and the obligation to extradite or prosecute. In particular, in the Sixth Committee, that question was dealt with in different ways by various States — that either demanded joint treatment of those legal concepts or called for their consideration as separate topics.[23]

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[22] See United Kingdom, *Bartle and the Commissioner of Police for the Metropolis and Others; ex-parte Pinochet [2000] 1 AC 61; Bartle and the Commissioner of Police for the Metropolis and Others; ex-parte Pinochet [2000] 1 AC 147;* and *T v Secretary of State for the Home Department [1996] AC 742 (per Lord Mustill).*

[23] See A/CN.4/577, para. 104.

75. Although the comments and information provided by States are still far from being complete and from giving a solid and definite basis for constructive conclusions, it seems possible, already at the present stage, to formulate provisionally a draft article concerning the scope of application of future draft articles on the obligation to extradite or prosecute. That can be done without prejudice to a final decision on the substantive extent of the present exercise, for instance on whether (or not) to include in the draft articles such elements as universal jurisdiction.

76. Taking into account the considerations made in the preliminary and in the present report, the Special Rapporteur would like to suggest the following formulation of that first article.

Article 1
Scope of application

> The present draft articles shall apply to the establishment, content, operation and effects of the alternative obligation of States to extradite or prosecute persons under their jurisdiction.

77. Three elements proposed in draft article 1 could be more closely analysed when formulating a final version of the provision. They are set out below:

(a) The time element — i.e., the extension of the application of the future draft articles to the periods of establishment, operation and production of effects of the obligation in question;

(b) The substantive element, namely, a specific, alternative obligation of States to extradite or prosecute;

(c) The personal element, namely, the persons against whom the above-mentioned obligation of States may be exercised.

78. The Special Rapporteur, in a short survey of those three elements, would like to identify the main problems connected with them, which could become a subject for discussion by the members of the International Law Commission.

1. Time element

79. It is not possible to define the scope of application of the draft articles on the obligation to extradite or prosecute without taking into account the various periods of establishing, operating and producing effects of the obligation in question. Those draft articles cannot be limited exclusively to a presentation of that obligation in a "frozen" form, separate from its origins and the subsequent results of its operation.

80. Consequently, there are at least three specific periods of time, connected with the establishment, operation and effects of the obligation *aut dedere aut judicare*, that possess their particular characteristics, which should be reflected in the draft articles.

81. As regards the period of establishment of the obligation to extradite or prosecute, a matter of paramount importance seems to be the question of the sources of the obligation. Questions connected with the other periods shall be identified later in accordance with the preliminary plan of action contained in the previous report.

2. Substantive element

82. This part of draft article 1 indicates the alternative nature of the obligation *aut dedere aut judicare* — a characteristic which has to be developed in subsequent articles. The specific construction of that obligation is important for its substantive content. In subsequent draft articles, a more detailed analysis of the mutual impact of the form and the substance of the obligation to extradite or prosecute seems to be required.

83. For the purpose of the present exercise, the term "obligation" seems to be more suitable from the legal point of view than the more passive term "principle", suggested by some members of the Commission and delegations in the Sixth Committee.

84. Similarly, some members contested the concept of obligation, favouring the right of States to extradite or prosecute. The question was raised whether the State concerned is obliged, or only authorized, to extradite or prosecute. Even while accepting the formula of an obligation, some members wondered whether that obligation was an absolute or just a relative one.

85. As was already noted in the preliminary report, the Special Rapporteur favoured the concept of "obligation", which is more useful for codification purposes, rather than the other suggested structure of a "principle". The concept of obligation also seems to be more appropriate given the rather generally recognized nature of *aut dedere aut judicare* as a secondary rule and not a primary one.

86. Furthermore, as was mentioned before, in its work on the draft Statute for an International Criminal Court, adopted in 1994, as well as in the process of elaboration of the draft Code of Crimes against the Peace and Security of Mankind, adopted in 1996, the International Law Commission consistently used the expression of "the obligation to extradite or prosecute".[24]

87. It has to be stressed, however, that, even while he endorses the concept of obligation, the Special Rapporteur agrees with the suggestion that the obligation in question, as well as its elements — *dedere* and *judicare* —, should be very carefully analysed, taking into account, for instance, its specific character as a conditional obligation, as was also pointed out by some members of the Commission. That conditional nature seems to be especially noteworthy with regard to the first part of the alternative obligation, namely, extradition.

88. Similarly, even while preferring to deal with the rule *aut dedere aut judicare* first of all in the context of obligations of States, the Special Rapporteur agrees with the observations of some members that in certain situations those obligations may be closely connected with appropriate rights of States, especially concerning the establishment of State jurisdiction over certain persons.

89. The alternative structure, deriving directly from the traditional expression *aut dedere aut judicare*, suggests a choice between "extradition" and "prosecution", although during the debate in the Commission the opinion was expressed that *aut dedere aut judicare* is a conditional obligation and not an alternative one. The Commission has to decide whether, and to what extent, an obligation to extradite or

[24] See notes 5 and 6 above.

prosecute exists, and whether it is an absolute or relative one. There are numerous questions which may appear in connection with that alternative.

90. The first question is: which part of that alternative should have priority in the practice of implementing the obligation by States, or do States have freedom of choice between the extradition and the prosecution of the persons concerned? And, recalling what was said before about the possibility of extradition provided in some legislations not only for the purpose of prosecution but also for the enforcement of a judgement, in practical terms it is possible that a given State may have a chance to exercise both parts of the obligation *aut dedere aut judicare* towards the same person in the same case (albeit in the reverse order: first, *judicare*, and later, *dedere*).

91. The second question is whether the custodial State, which faces the request for extradition, has sufficient margin of discretion to refuse it when it is ready to enforce its own means of prosecution in that case or when the arguments upon which the request for extradition is based appear to be wrongful and contrary to the legal system of the custodial State.

92. The third question is the following: does the obligation *aut dedere aut judicare* include, or does it exclude, the possibility of any third choice? That question has special importance, in particular in the light of the alternative jurisdiction of the International Criminal Court established on the basis of the Rome Statute of 1998. The concept of "triple alternative", considering a possibility of parallel jurisdictional competences to be exercised not only by the interested States, but also by international criminal courts, was already presented by the Special Rapporteur in the preliminary report.[25]

93. There were, however, some opinions expressed in the Commission and in the Sixth Committee that the concept of "triple alternative" should be treated very carefully and within a very limited scope. As was, for instance, stressed by some members of the Commission, the distinction between extradition and surrender to the International Criminal Court should be taken into account.

3. Personal element

94. The obligation of States to extradite or prosecute is not an abstract one, but is always connected with the necessary activities to be undertaken by States vis-à-vis particular natural persons. Either extradition or prosecution in a given case has to be addressed to defined persons.

95. While jurisdiction may be established and exercised vis-à-vis both natural and legal persons, extradition can be used exclusively with regard to natural persons. Consequently, it seems that the obligation *aut dedere aut judicare* may be considered only in connection with natural persons.

96. A further condition for natural persons to be covered under the obligation *aut dedere aut judicare* is that they be under the jurisdiction of the States bound by that obligation "under their jurisdiction". That does not mean, of course, that such natural persons should be physically present in the territory of a given State or in another way be "in the hands" of that State (for example, to be on board aircraft registered in that State).

[25] See A/CN.4/571, paras. 52-54.

97. The terms "under their jurisdiction", proposed in draft article 1, mean both actual jurisdiction that is effectively exercised and potential jurisdiction which a State is entitled to establish over persons committing particular offences. They cover jurisdiction established, or to be established, on various grounds, taking into account that, as was noted in the report prepared by one non-governmental organization, there are in practice:

> Different types of jurisdiction, including the five principles of geographic jurisdiction (*ratione loci*). These are territorial jurisdiction (based on the place where the crime occurred) and four types of extraterritorial jurisdiction: active personality jurisdiction (based on the nationality of the suspect), passive personality jurisdiction (based on the nationality of the victim), protective jurisdiction (based on harm to the forum State's own national interests) and universal jurisdiction (not linked to the nationality of the suspect or victim or to harm to the forum State's own national interests).[26]

98. Furthermore, in connection with the concept of jurisdiction used in the present exercise, it has to be recalled that:

> Three types of extraterritorial jurisdiction should be distinguished: (a) legislative, prescriptive or substantive (the power of a State to apply its own law to cases with a foreign component), (b) executive (the power of a State to perform acts in another State's territory) and (c) judicial or adjudicative (the power of a State's courts to try cases with a foreign component).[27]

99. It seems that for the identification of rules governing the establishment, content, operation and effects of the obligation to extradite or prosecute, the concept of jurisdiction should be applied in its wider form, including all possible types of jurisdiction — both territorial and extraterritorial. Here, the Commission will have to decide precisely to what extent the concept of universal jurisdiction should be used for a final definition of the scope of the obligation *aut dedere aut judicare*. Bearing in mind all those particularities, we may get a better picture of the concept of jurisdiction that we are supposed to deal with in the present report.

100. When talking about the persons who are (actually or potentially) under the jurisdiction of States bound by the obligation to extradite or prosecute, one cannot forget the crimes or offences, to which the obligation is going to extend, committed by the persons concerned (or, at least, which those persons are suspected or accused of having committed). However, the Special Rapporteur is of the opinion that, for the purposes of the elaboration of the provision dealing with the scope of application of the draft articles on the obligation *aut dedere aut judicare*, it is not essential to include any direct remark concerning those crimes or offences in the actual text of draft article 1.

101. It will, of course, be impossible to avoid the question of such crimes or offences being developed in subsequent draft articles, since the problem of those crimes or offences, to which the obligation in question has to be, or could be, applied, was considered as one of the most important matters of the topic by the participants in the relevant debates both in the Commission and within the Sixth Committee. Consequently, in subsequent draft articles, space will be devoted to a

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[26] Amnesty International, *Universal Jurisdiction: The duty of States to enact and implement legislation* (London, September 2001), Introduction, p. 5.

[27] Ibid., chapter I, p. 1.

much more precise identification of the crimes or offences covered by the obligation to extradite or prosecute, on the basis either of binding international treaties or of national legislation and practice.

102. At the same time, the consideration of international customary rules as a possible source of criminalization of certain acts seems necessary and, consequently, so does the extension of the scope of the obligation *aut dedere aut judicare* to such internationally recognized criminal acts. There are, however, differences of opinion concerning whether any acts, and if so what kind of acts, could be recognized as crimes or offences covered by the obligation in question.[28]

103. The Special Rapporteur already highlighted that problem in the preliminary report, with the various proposals made by States and in the legal literature concerning the crimes or offences which could, or should, be covered by that obligation. It is worth noting that, to some extent, such crimes or offences would fall among the crimes subject to universal jurisdiction. The efforts to identify those crimes continue in numerous proposals made by States and in the legal literature.[29]

104. A further proposal may be recalled herein in addition to those already presented in the preliminary report; it is linked to the concept of what are known as "serious crimes under international law" and was referred to in "The Princeton Principles on Universal Jurisdiction" of 2001.[30] According to that proposal, the application of universal jurisdiction to crimes described therein as "serious crimes under international law" would be possible (principle 2(1)),[31] with the potential for extending that jurisdiction to other crimes (principle 2(2)),[32] and with the simultaneous application of the obligation *aut dedere aut judicare* (principle 10(2)).[33]

B. Plan for further development

105. Draft article 1, dealing with the "scope of application of the draft articles", as proposed in paragraph 76 of the present report, has to be accompanied directly by other articles connected substantively and formally with the first one. As usual, in conformity with the approach followed in other drafts elaborated by the International Law Commission, the provision following the initial one will include a definition or description of the terms used for the purposes of the draft articles. Although it would be difficult at the present stage to give a full list of such terms, some of them should simply derive from the proposed text of draft article 1.

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[28] See paras. 31-33, above.

[29] See A/CN/571, paras. 20-22.

[30] *The Princeton Principles on Universal Jurisdiction* (Princeton, New Jersey: Programme in Law and Public Policy, 2001).

[31] "*Principle 2 – Serious Crimes Under International Law*. 1. For the purposes of these principles, serious crimes under international law include: (1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture." (Ibid., p. 29).

[32] "*Principle 2 — Serious Crimes Under International Law* ... 2. The application of universal jurisdiction to the crimes listed in paragraph 1 is without prejudice to the application of universal jurisdiction to other crimes under international law." (Ibid., p. 29).

[33] "*Principle 10 — Grounds for Refusal of Extradition* ... 2. A State which refuses to extradite on the basis of this principle shall, when permitted by international law, prosecute the individual accused of a serious crime under international law as specified in principle 2(1) or extradite such person to another State where this can be done without exposing him or her to the risks referred to in paragraph 1." (Ibid., p. 34).

106. Consequently, a future draft article 2, entitled "Use of terms", will provide a definition, "for the purposes of the present draft articles", at least of such terms as extradition, prosecution and jurisdiction. It would probably be useful to describe, in a more detailed way, the term "persons", perhaps in connection with the crimes or offences committed by them. It seems that draft article 2 should remain open until the end of the exercise to give the opportunity to add other definitions and descriptions whenever necessary.

107. Another draft article (or even a set of articles) that may already be foreseen at the present stage is connected with a more detailed description of the principal obligation *aut dedere aut judicare*. Although there are still some differences of opinion concerning the issue of whether the obligation has a customary source, there is a rather general consensus as to the fact that international treaties are a more generally recognized source of the obligation to extradite or prosecute.[34]

108. The growing general nature of such recognition seems to be confirmed by a growing number of international treaties — both multilateral and bilateral — and may serve as justification for at least a provisional formulation of a draft article X, stating that: "Each State is obliged to extradite or to prosecute an alleged offender if such an obligation is provided for by a treaty to which such State is a party".

109. That formulation alone cannot serve as sufficient background for the codification of a generally binding customary rule, but the development of international practice based on the growing number of treaties establishing and confirming such an obligation may lead at least to the beginning of the formulation of an appropriate customary norm.[35] On the basis of the information contained in the submissions made so far by States, and of the documentation gathered by the Secretariat, in his next report the Special Rapporteur will try to present a systematic survey of the relevant international treaties, together with a classification of the extent of the obligations contained in them. Various criteria may be identified and applied to such a classification.

110. Starting with the best known, and the most often applied, of the Hague model treaties, based on the formula contained in article 7 of the Convention for the Suppression of Unlawful Seizure of Aircraft, made at The Hague on 16 December 1970,[36] some variants of the application of the model have already been developed and identified in the legal literature.[37]

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[34] See A/CN.4/571, paras. 35-39.

[35] "If a State accedes to a large number of international treaties, all of which have a variation of the *aut dedere aut judicare* principle, there is strong evidence that it intends to be bound by this generalizable provision, and that such practice should lead to the entrenchment of this principle in customary law", C. Enache-Brown and A. Fried, "Universal Crime, Jurisdiction and Duty: The Obligation of *Aut Dedere Aut Judicare* in International Law", *McGill Law Journal*, vol. 43 (1998), pp. 628-629.

[36] United Nations, *Treaty Series*, vol. 860, No. 12325. Under article 7 of the 1970 Hague Convention: "The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution."

[37] For more examples, see M. Plachta, "*Aut Dedere Aut Judicare*: An Overview of Modes of Implementation and Approaches", *Maastricht Journal of European and Comparative Law*, vol. 6 (1999), No. 4, p. 360.

111. Moreover, some of the treaties imposing the obligation *aut dedere aut judicare* follow, not the so-called "offence-oriented approach" (as in article 7 of the 1970 Hague Convention, mentioned above), but rather the "offender approach", reflected, for instance, in article 6, paragraph 2, of the 1957 European Convention on Extradition[38] and in the United Nations Model Treaty on Extradition.[39]

112. In any case, if a larger number of treaties incorporating clauses that formulate in one way or another the obligation to extradite or prosecute can be identified as binding for a growing number of States, then a more solid basis can be established for further consideration. Thereafter, the question could also be considered of whether a growing quantity of such obligations accepted by States may be considered justification for the change of quality of those obligations — from purely treaty obligations to generally binding customary rules.

113. Apart from the question of the treaty background for the obligation *aut dedere aut judicare*, there is also another source of interesting suggestions concerning the 29formulation of other subsequent draft articles: the previous observations made by the International Law Commission, which — as was already mentioned in the preliminary report[40] — incorporated the *aut dedere aut judicare* rule in the 1996 draft Code of Crimes against the Peace and Security of Mankind and simultaneously explained the obligation and its rationale.

114. Certain formulations were included in those explanations which could now serve as sui generis directives for possible further draft articles on the obligation to extradite or prosecute. They contain, for instance, quasi-rules such as:

(a) The obligation to prosecute or extradite is imposed on the custodial State in whose territory an alleged offender is present;

(b) The custodial State has an obligation to take action to ensure that such an individual is prosecuted either by the national authorities of that State or by another State which indicates that it is willing to prosecute the case by requesting extradition;

(c) The custodial State has an obligation to take the necessary and reasonable steps to apprehend an alleged offender and to ensure the prosecution and trial of such an individual by a competent jurisdiction;

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[38] United Nations, *Treaty Series*, vol. 359, No. 5146. Under article 6, paragraph 2, of that Convention: "If the requested Party does not extradite its national, it shall at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate. For this purpose, the files, information and exhibits relating to the offence shall be transmitted without charge by the means provided for in article 12, paragraph 1. The requesting Party shall be informed of the result of its request."

[39] Under article 4 (Optional grounds for refusal) of this Model Treaty: "Extradition may be refused in any of the following circumstances: (a) If the person whose extradition is requested is a national of the requested State. Where extradition is refused on this ground, the requested State shall, if the other State so requests, submit the case to its competent authorities with a view to taking appropriate action against the person in respect of the offence for which extradition had been requested" (General Assembly resolution 45/116, annex).

[40] A/CN.4/571, para. 10. See also the text of the relevant article of the draft Code reproduced in note 5 above.

(d) The obligation to extradite or prosecute applies to a State which has custody of "an individual alleged to have committed a crime".[41]

115. The Special Rapporteur would like to stress that he is not formally presenting those quasi-rules as proposals for draft articles. They are just still very preliminary ideas regarding the future substance and form of such draft articles. The ideas were once expressed by the Commission, though in a different context, and therefore the Special Rapporteur saw fit to bring them to the attention of the members of the Commission for their comments.

116. At the present stage, the Special Rapporteur would like to confirm that the "preliminary plan of action" that was formulated in 10 main points, as contained in chapter VIII of the preliminary report,[42] remains the main road map for his further work, including the continued gathering and analysis of highly informative materials concerning legislation (international and national), judicial decisions, practice of States and doctrine, collected with the kind assistance of the Secretariat. It should create sufficient background for the effective elaboration of subsequent draft articles.

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[41] See para. 3 of the commentary to article 9 of the draft Code of Crimes against the Peace and Security of Mankind (*Yearbook ... 1996*, vol. II (Part Two), p. 31).

[42] See A/CN.4/571, para. 61.

United Nations A/CN.4/585/Corr.1

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Second report on the obligation to extradite or prosecute (*aut dedere aut judicare*)

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Corrigendum

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2. Section III.C

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